FEDERAL MARITIME COMMISSION
SERVED APRIL 10, 1987
EXCEPTIONS DUE 5-4-87
REPLIES TO EXCEPTIONS DUE 5-26-87

FEDERAL MARITIME COMMISSION

Docket NO. 85-20

PALMETTO SHIPPING & STEVEDORING COMPANY, INC.

v.

GEORGIA PORTS AUTHORITY[1]

Complainant, a vessel agent and stevedoring company doing business in Savannah, Georgia, alleges that respondent Georgia Ports Authority is engaging in unreasonable and prejudicial practices by holding vessel agents responsible for payment of certain terminal charges under respondent's tariff, by billing container-related charges and certain breakbulk charges to the vessel agents, by publishing a tariff provision allowing agents' payments to be applied to unrelated invoices, by preferring certain vessel operators and agents, prejudicing other agents, and by sending monthly statements without naming vessels. It is held:

(1) Vessel agents have been doing business in Savannah for years with full knowledge of GPA's tariff holding them responsible for payment of certain charges, have derived considerable benefit from doing such business, and have done so voluntarily for economic reasons, not because of unlawful duress, business coercion, or unconscionable agreements imposed by a monopolistic GPA. The agents' problems stem primarily from their own competitive situation and a declining economic climate, not GPA's tariff;

(2) GPA is entitled to look to local agents for payment of its charges and is not required to relieve agents' competitive problems and risk loss of business to competing ports by refusing to allow a willing agent to advance payments for a vessel principal or by otherwise demanding advance security from vessels;

[1] The title of this case has been changed to reflect the fact, discussed in the decision, that the previous complainant, Harrington & Company, Inc., has withdrawn its complaint.

(3) GPA's practice in billing container-related charges to vessel agents is based on carriers' legal obligations and control over containers as well as practices at other ports and is not unlawful. GPA states that it does not bill vessel agents for services to breakbulk cargo but the evidence is contradictory and the tariff needs clarification. GPA's tariff provision regarding application of agents' payments to invoices without regard to the vessel principal involved is unlawful and must be deleted;

(4) Although there are facts at Savannah that are different from those found to exist in previous Commission decisions in the so-called WGMA cases, upholding vessel-agent responsibility, there are similar facts and other facts not favorable to the Savannah agents' contentions;

(5) Complainant's arguments that GPA prefers certain vessel operators or agents, bills agents for services ordered by other agents, and sends monthly statements to agents without naming vessels, are not shown to constitute violations of law.

George L. Lewis for complainant Palmetto Shipping & Stevedoring Company, Inc.

Michael J. Bowers, Marion O. Gordon, J. Robert Coleman, Daniel M. Formby, and Gustave R. Dubus, III for respondent Georgia Ports Authority.

J. Alton Boyer for intervenor Association of Ship Brokers and Agents (U.S.A.), Inc.

Aaron W. Reese as Hearing Counsel.

INITIAL DECISION[2] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

This case concerns the question of the reasonableness and lawfulness of the practices and tariff provisions of a marine terminal operator at Georgia ports who allegedly holds vessel agents liable for payment of terminal charges published in the operator's tariff when terminal services are performed for the agents' vessel principals or for other persons using the services or facilities of the terminal.

The case began with the filing of a complaint by two steamship agencies on September 5, 1985, which complaint was served on respondent Georgia Ports Authority (GPA) on September 9, 1985. Complainants alleged

[2] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

that GPA's tariff provisions holding vessel agents liable for terminal charges as principals or guarantors of payments of such charges subject the agents to undue or unreasonable prejudice and disadvantage and are unjust and unreasonable, in violation of sections 16 First and 17 of the Shipping Act, 1916 (46 U.S.C. app. sec. 815, 816) and corresponding provisions of the Shipping Act of 1984, sections 10(b)(11); 10(b)(12); 10(d)(1) (46 U.S.C. app. secs. 1709(b)(11); 1709(b)(12); 1709(d)(1)). Complainants alleged, furthermore, that until recently GPA has only dealt with vessel agents as "conduits" for payment of charges by their principals but now is attempting to hold the agents liable as principals or guarantors. Complainants also attacked certain other practices and tariff provisions relating to GPA's assessment of particular charges for particular services, GPA's requirement that agents sign a sheet agreeing to be bound by the GPA tariff, and a practice by which GPA allegedly applies payments by vessel agents to principals other than the principal for which the agents paid the account.

In addition to the foregoing matters, complainants alleged that they received no benefits or disproportionately small benefits compared to the size of the terminal charges they are called upon to pay, contrary to the standards enunciated by the Supreme Court in Volkswagenwerk AG. v. F.M.C., 390 U.S. 261 (1968), and that they were acting as agents for disclosed principals who should be liable for the subject charges rather than the agents. Complainants asked for orders proscribing the foregoing practices, striking tariff provisions, and awarding reparation, including interest, costs, and attorney's fees and any sums which complainants might be ordered to pay to GPA as a result of two state court suits, as well as an order prohibiting GPA from seeking collection of certain unpaid terminal charges in a state court.

The immediate cause of the filing of the complaint appears to have been the fact that GPA brought suit against the two vessel agents who were complainants in this case, seeking to recover payment for certain services allegedly rendered to vessels.[3] In those suits the vessel agents had asserted, among other things, that the GPA's tariff and practices relating to the matter of the agents' liability were unlawful under sections 16 and 17 of the 1916 Act.

The original complaint was met with an answer filed by GPA in which GPA denied any wrongdoing and denied that its tariff provisions or practices were unlawful. Affirmatively, GPA claimed that complainant-agents were trying to relitigate issues that had been decided adversely to them in previous decisions of the Commission and that complainants were trying to delay or frustrate GPA's legitimate collection efforts. In addition, GPA asserted, among other things, that vessel agents had been found to be "users" of terminal facilities and services in previous Commission decisions and that the agents received benefits because their principals, the vessel operators, did not have to post bonds or other

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[3] The two state court actions are styled Georgia Ports Authority v. Ibero Lines and Harrington & Company, Inc., Civil Action No. 84-1365, State Court, Chatham County, Georgia; and Georgia Ports Authority v. Palmetto Shipping and Stevedoring Company, Inc., Civil Action No. 84-2389, State Court, Chatham County, Georgia. At the time the complaint was filed, these cases were pending in the court. The cases have since come on for trial by jury and on January 13, 1987, the court issued its judgments in favor of GPA, awarding damages in the amount of $54,162.86 and $31,318.66, respectively, plus post-judgment interest and costs. (See copies of judgments attached to Complainant's Reply Brief.) These awards appear to be about one-half of the amounts claimed by GPA.

security and were given credit by having the vessel agents responsible for payment of GPA's tariff charges.

Before the case could proceed to develop the evidentiary record by oral hearing or otherwise, it was necessary to issue certain preliminary rulings. First, complainants' motion to stay the proceeding pending decision of the Commission in two other cases was denied mainly because the facts and issued in the other cases were different from those in the instant case. (See Motion for Stay Denied, October 7, 1985). Second, and more importantly, it became apparent that extensive preliminary rulings on questions of applicable law would be necessary to guide the parties. That was because complainants had argued that this case should include consideration of the classic test enunciated in Volkswagenwerk, cited above, and GPA, on the other hand, had argued to the contrary and furthermore had contended that the legal principles establishing the reasonableness of vessel-agent liability under port terminal tariffs had been firmly established in a series of cases, most prominently, the so-called WGMA cases.[4]

In order to resolve these questions and ensure an efficient hearing process in which evidence would be developed under the correct principles, I approved a briefing schedule devised by the parties by which

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[4] There are three WGMA cases, namely, West Gulf Maritime Association v. Port of Houston Authority, 21 F.M.C. 244 (1978), affirmed without opinion under the name West Gulf Maritime Ass'n v. F.M.C., 610 F. 2d 1001 (D.C. Cir. 1979), cert. denied 449 U.S. 822 (1980) (WGMA I); West Gulf Maritime Association v. Port of Houston Authority, et al., 22 F.M.C. 420 (1980), affirmed without opinion under the name West Gulf Maritime Ass'n v. F.M.C., 652 F. 2d 197 (D.C. Cir. 1981), cert. denied 454 U.S. 206 (1981) (WGMA II); West Gulf Maritime Association v. The City of Galveston, 22 F.M.C. 101 (1979) (WGMA/Galveston). There are other decisions of a similar nature regarding vessel-agent liability provisions in terminal tariffs which were discussed in my preliminary rulings cited below.

complainants, respondent, and other parties who had been granted intervention filed briefs presenting their arguments on the legal issues. The intervening parties were the Commission's Bureau of Hearing Counsel, whose petition for intervention was granted on October 31, 1985, the Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA), and 11 ports mainly in the Gulf area whose interventions were granted on December 2, 1985. ASBA supported the position of the complainant-agents whereas Hearing Counsel and the 11 ports supported the position of GPA. The participation of intervenors, ASBA and the 11 ports, was, however, limited to their presenting legal arguments as to governing principles of law.

The Preliminary Rulings as to Governing Principles of Law

As a result of the schedule discussed above, the parties presented their arguments on the question as to governing principles of law. The positions of the parties and the determinations are set forth in great detail in my rulings issued January 16, 1986, which were affirmed by the Commission on August 4, 1986. (See Rulings on Motions for Summary Judgment, etc., 23 SRR 753, affirmed, 23 SRR 1276.) These rulings are lengthly and detailed and need not be repeated verbatim at this time. However, a brief summary of them should be helpful to an understanding of the present decision.

Complainant-agents had argued that they were agents and could not be held responsible for terminal charges incurred by their principals, the vessel operators, under agency law but that, even if they could be held liable under an exception to agency law, their liability must be limited by determining what benefits or services they received compared to the charges they were asked to pay, i.e., the test enunciated by Volkswagenwerk, cited above. In none of the previous decisions of the Commission holding vessel agents liable for terminal charges was the Volkswagenwerk test used, and, it was argued, those decisions were invalid as precedent for that reason as well as for other reasons. Complainants also argued that GPA's tariff Items 140 and 95-A were unlawful. Tariff Item 140, the basic item imposing liability on vessel agents, it was argued, was ambiguous and unclear as to who among the various interests involved in moving cargo through GPA's facilities, e.g., vessel owners, freight forwarders, customhouse brokers, vessel agents, pays what charges. Item 140, furthermore, was allegedly unreasonable because it seemed to preclude assessment of cargo charges against shippers or consignees and, among other things, allegedly held vessel agents liable for charges that should be borne by freight forwarders. Tariff Item 95-A, which stated that use of GPA's terminals constituted evidence of consent to the terms of the tariff, and a separate Customer Data Sheet, which vessels agents and presumably other persons sign, it was also argued, were unlawful.

ASBA, the association of agents, supported complainants' arguments and added detailed arguments of their own. ASBA argued that the rationale of the WGMA decisions, i.e., port efficiency, did not apply in the instant case, that it was consequently not reasonable to hold agents liable for the debts of their disclosed vessel principals, and unlike the WGMA situation, agents were not paid a commission by the port to act as port collection agents. ASBA also argued that the WGMA cases erred because they did not apply the Volkswagenwerk test, that the facts in Georgia were different from those at Gulf ports in the WGMA cases, that the burdens on agents at Georgia ports were severe, unlike the WGMA situation, that GPA is a monopoly, unlike Houston in the WGMA cases, and that GPA's tariff provisions absolve cargo interests from cargo charges and fail to make vessels liable for vessel charges, etc.

GPA, the 11 intervening ports, and Hearing Counsel disagreed with the above contentions. They argued that the previous decisions of the Commission in the WGMA and other cases were valid precedent and that vessel agents could properly be held responsible for payment of terminal charges as "users" of terminal services and facilities. They argued that agents could contract on their own credit to be responsible for terminal charges and that they in fact did so at Georgia ports, were aware of the agent-responsibility provisions in GPA's tariff, that agents were correctly held to be "users" of port services and facilities, and that the ports need to look to local agents for collection of charges for the sake of efficiencies in running the ports. These parties also contended that the Volkswagenwerk test is irrelevant to the instant case because that test relates to the levels of terminal charges and to allocations of such charges among users of terminal services and facilities, not to the question of agent liability for payment. Hearing Counsel specified, however, that they supported the principle of agent liability as enunciated in previous decisions of the Commission but with the understanding that such liability could extend only to charges that would be proper against the vessel themselves, as according to GPA, was the practice at Georgia ports.

GPA defended its tariff Item 140 by arguing that its tariff should be read as a whole to understand how it works, and that, if that is done, it can be seen that vessel agents are only required to pay for services performed for the party actually receiving the service and that vessel charges are assessed against vessel agents and cargo charges against freight forwarders and customhouse brokers. The vessel agents, according to GPA, are only co-obligors with the vessels for services rendered to the vessel, and the agent is sent invoices because the agent has established credit with GPA. Tariff Item 150, according to GPA, sets forth the terms under which services are provided, i.e., payment in advance unless credit has been established.

Complainants filed their reply brief reiterating their earlier arguments and elaborating upon their contentions that the WGMA situations were not the same factually as the instant case, that GPA is a monopoly, pays no commission to vessel agents to act as collection agents, and is burdening the agents severely compared to the burdens imposed on other users of the GPA facilities. Thereafter, I issued rulings, summarized as follows (23 SRR at 760-761):

1. The previous decisions of the Commission holding that vessel agents can be held responsible for payment of certain terminal charges performed for their vessel principals were based upon findings of fact that the agents had become personally liable by agreeing to act as collection agents and that their agreement to act and to pledge their own credit was shown by prior course of conduct, normal business practices, and continuing and voluntary use of port facilities. The Commission found furthermore that the practice of looking to local vessel agents for payment was reasonable and in furtherance of port efficiencies. Unless the facts at Georgia ports are different, those decisions are precedent and ought to be followed.

2. If, by separate agreement, custom, practice, or otherwise, vessel agents have become personally liable to pay vessel-related

terminal charges, the reasonableness of such a practice is not measured by comparing the benefits received by the agents compared to the vessel charges they must pay, i.e., the classic Volkswagenwerk test. That is because that test applies to direct, multiple users of the same terminal services and facilities and seeks to ensure that one direct user and beneficiary of a service is not paying at a much higher rate than another direct user or beneficiary of the same service although the former user is deriving fewer benefits from the service than the latter direct user of the same service. Vessel agents are not direct physical users of terminal services or facilities but are rather persons who arrange for services to be performed for their vessel principals. Therefore, their agreement, understanding, or contract which may be implied in fact because of a long course of conduct by which they have accepted invoices from GPA and paid them, can be evaluated under the normal law of contracts, by which law such contracts would be enforceable if supported by consideration and were free of coercion and duress, were not unconscionable, and were not contrary to public or regulatory policy.

3. If the above type of contract, agreement, or understanding between vessel agents and GPA exists at Georgia ports, and it is not unconscionable or the product of unlawful duress or coercion, the arrangement might still be unreasonable if vessel agents were being compelled to be responsible for charges for which vessels or their agents have no normal duty or connection, such as, for example, charges for services rendered exclusively for cargo. Such an arrangement would have to be justified by clear evidence that the agents voluntarily undertook to be responsible for such charges in return for specific consideration.

4. If GPA's tariff provisions are unclear or ambiguous in certain respects, this does not mean that the related practices are unreasonable or unlawful. It means that GPA may have to clarify the tariff to conform to actual practices and would not preclude agents from paying charges under a lawful, reasonable agreement or understanding with GPA. A "use equals consent" rule in a terminal tariff is not unreasonable per se nor is a separate consent form which is not mentioned in the tariff.

The above rulings were explained and supported by detailed references to previous decisions of the Commission and the courts, which explanations are incorporated by reference into the present decision and need not be repeated verbatim. The reader is, however, urged to consult them. (See 23 SRR at 761-785.) For the sake of convenience to the reader and as an aid to understanding the present decision, they are briefly summarized as follows.

Previous decisions of the Commission and courts have consistently held that ports may hold vessel agents responsible to pay certain terminal charges. The seminal decision is undoubtedly that rendered in WGMA I. (West Gulf Maritime Association v. Port of Houston Authority, cited above, 21 F.M.C. 244). Subsequent decisions of the Commission generally cite WGMA I and add little more to the body of agent-liability law. In WGMA I, the Commission found that through a prior course of conduct and business practices and by continuing and voluntary use of the port's facilities at Houston, vessel agents who were found to be "users" and beneficiaries of the terminal facilities, at least in a vicarious sense, had become personally liable to pay the port's tariff charges. The many factual details as to the situation in WGMA I are too lengthy to be repeated here and should be consulted in the rulings cited. However, among them are the fact that the Commission found the practice of billing local vessel agents rather than outside vessel operators reasonable and conducive to port efficiency especially with regard to reduction of delay and of billing costs, that vessel agents did not experience undue costs or risks under the system, that the vessel agents were doing business with the port with knowledge that the port was relying on the personal credit of the agent, thereby avoiding the necessity of having vessel owners post security, that the agents had impliedly agreed to this system which was embodied in the port's tariff when the agents utilized the port's facilities, that the agents could protect themselves by obtaining indemnification agreements from their vessel principals or by requiring the principals to furnish security to the port in advance, that the agents had not been subjected to unlawful duress and business coercion, that the agents could use alternative facilities at Houston, and that the agents received a commission from the port for their collection efforts.

In WGMA II, (West Gulf Maritime Association v. Port of Houston Authority, et al., cited above, 22 F.M.C. 420), the same association of vessel owners, stevedores, and agents challenged tariff provisions and practices at seven Texas ports, which, among other things, held vessel agents liable for dockage, wharfage, outbound cargo demurrage charges, and shed and pier use. These tariffs also provided that agents were "users" of the ports' facilities and that users consented to the terms and conditions of the tariffs. Again, the Commission found the tariff provisions and practices to be reasonable and stressed the point that vessel agents could be held liable for payment of charges if the charge was a proper charge against the vessel. The Commission, as in WGMA I, held that the agents and other complainants had the burden of proof to show that the prevailing system was unlawful.

Other decisions of the courts and the Commission are consistent with the WGMA cases on such points as those holding that "users" can be held responsible for terminal charges and that it is reasonable to hold vessel agents liable for vessel-related charges or for ports to rely upon their credit. (See rulings cited, 23 SRR at 764-765.) Thus, in City of Galveston v. Kerr Steamship Co., Inc., et al., 362 F. Supp. 289 (S.D. Tex. 1973), cited in the rulings, (23 SRR at 764), the court held it reasonable for the port to bill vessel agents for outbound pier demurrage on cotton which had been stranded on the piers during a longshoremen's strike even though the vessel agents had not been responsible for the accrual of demurrage. The court found that the port would have difficulties in billing individual persons responsible for demurrage, that agents routinely paid such charges and then sought reimbursement from vessel owners or charterers, and that agents used the facilities and therefore had to accept potential liability under the tariff.

In Georgia Ports Authority v. James, 1980 A.M.C. 590 (State Court, Chatham County, Georgia 1979), cited in the rulings (23 SRR at 764), GPA sued a freight forwarder/customhouse broker for services rendered under the tariff for the handling of freight. The court held for GPA and rejected the forwarder/broker's argument that it had operated only as an agent.

In WGMA/Galveston, 22 F.M.C. at 103, cited in the rulings (23 SRR at 765), the Commission held that it was reasonable for the port's tariff to define steamship agents, among other persons, as "users" of the port's facilities because "steamship agents are sufficiently involved in the use of Port facilities to be subject to those tariff provisions which the Commission herein concludes are reasonable."

Finally, in three other Commission cases and a court case, the matter of vessel-agent liability under port terminal tariffs was in issue. In each case in which the issue was decided, the decision held the agents liable. (See rulings cited, 23 SRR at 765, n. 7.)[5]

My next ruling regarding the validity of the WGMA and related decisions and the inapplicability of the Volkswagenwerk test was explained in detail in the rulings cited. (See 23 SRR at 767-771.) I concluded that the Volkswagenwerk test and all cases in which that test had been held to be applicable by the courts applied to multiple, direct users of the same terminal services or facilities and was designed to

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[5] Two of the Commission decisions involved Plaquemines Port, Harbor, and Terminal District a port district in operation on the Mississippi River. These were Louis Dreyfus Corp. v. Plaquemines Port, Harbor, and Terminal District, 21 SRR 1072 (1983); and New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District, 23 SRR 705 (I.D., adopted by the Commission, 23 SRR 1363 (1986)). The first Plaquemines decision held lawful a "surety" provision in the port's tariff and cited "WGMA I" for the principle that a terminal operator can hold all direct and indirect users of its services liable for tariff fees. In the second Plaquemines decision, the Commission followed the first decision and held that vessel agents could be liable for the port's fees as indirect users and beneficiaries of the port's services. At the time of my rulings, the Commission had not yet adopted the Initial Decision. However, after my rulings, the Commission elaborated upon the principles enunciated in WGMA I holding that agents, as indirect users of terminal facilities, could be held liable for tariff charges related to that use absent duress or monopoly abuse and as a result of the agents' course of conduct. See 23 SRR at 1374-1376. The third Commission decision was Kerr Steamship Co. v. Port of New Orleans, etc., 23 SRR 1294 (1986), and a related court proceeding in which the District Court had found Kerr, the vessel agent, liable for inbound demurrage charges. On appeal, the Court of Appeals stayed the proceedings and referred the matter to the Commission. However, Kerr settled and withdrew its complaint. See 23 SRR 1294, adopting 23 SRR 1040. The Initial Decision, which was adopted, however, did indicate that holding vessel agents liable for inbound demurrage charges, which had accrued after the vessel's legal obligations had terminated, was not reasonable. See 23 SRR at 1043-1044.

ensure that no user of the facilities had to pay a disproportionately high amount of money compared to the benefits that user was receiving as compared to the benefits another direct physical user was receiving. Because the question of vessel-agent liability did not involve the question of the level of the charges and the allocation of such charges among multiple direct users of the same services, the classic Volkswagenwerk test was inapposite. The reasonableness of the practice of holding vessel agents liable for terminal charges could be determined not by engrafting the irrelevant Volkswagenwerk benefits-burdens test but by applying the principles developed in normal agency and contract law, i.e., consideration, duress, unconscionability, and regulatory law, i.e., abuse of monopoly power, or whether the terminal practice was "otherwise lawful, not excessive, and reasonably related, fit, and appropriate to the ends in view." (See WGMA I, 21 F.M.C. at 248, and cases cited therein.)[6] In other words, the facts to be developed might show that

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[6] In its recent decision in New Orleans Steamship Association v. Plaquemines, etc., cited above, 23 SRR 1363, the Commission reiterated the distinction between the classic benefits-burdens test of Volkswagenwerk and the measurement of a reasonable practice in WGMA I and related cases. As the Commission indicated, it is improper to try to compare the benefits which direct users such as vessels obtain from terminal services with the benefits which indirect users, such as vessel agents, obtain. Thus, as I indicated in my rulings (23 SRR at 771), it is futile to try to compare small agents' fees with relatively huge revenues derived by vessels and to strike down vessel-agent liability for terminal charges because the agents' fees are relatively small. Under that test probably no agent liability provision would pass muster. The Commission's decision indicated, however, that vessel agents were indirect users of terminal facilities, that they derived some benefit from doing business at the port, and that such benefit was "substantial enough to justify the potential liability for the charges owed by their principals." 23 SRR at 1375. Thus, it is simplistic and wrong to argue, as do the agents, that their benefits, i.e., the small agency fees, are too small to justify paying hundreds of thousand of dollars in terminal charges for their vessel principals in the context of the inapposite Volkswagenwerk test. The better analysis would be to compare the receipt of agency fees (Footnote continued on following page.)

vessel agents, through a course of conduct unaffected by unlawful coercion, duress or unconscionability, had entered into agreements, understandings, or contracts by which, in return for certain benefits and consideration, they would pledge their own credit and agree to be personally responsible to pay terminal charges for services rendered to their vessel principals. If so, numerous authorities hold that the agents no longer function as mere agents with respect to third persons but become principals themselves and become personally liable. (See the discussion in 23 SRR at 772-776.)

My next conclusion concerned the possibility that, although it might not be unreasonable for GPA to look to the local agents for payment of terminal charges, it might be unreasonable to hold agents liable to pay for services rendered to cargo interests as to which the vessels had no duty or connection, absent special consideration. This conclusion is supported by the principle that ocean carriers' obligations to cargo terminate at some point, at which time it becomes the duty of the consignee or other cargo interest to pick up or otherwise care for the cargo. There are strong indications in both WGMA I and WGMA II that imposition of responsibility on vessel interests for payment of charges related to services performed outside the scope of the vessel's legal obligations toward the cargo would be unreasonable. (See discussion at 23 SRR at 764 n. 5; 770 n. 11; and at 778.) This conclusion has since been confirmed by the Commission in <u>Kerr Steamship Co.</u> v. <u>Port of New</u>

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[6] (Footnote continued from preceding page.) and the ability to perform lucrative stevedoring services in conjunction with the agency services, i.e., the totality of benefits derived over many years with the <u>risk</u> that occasionally a vessel principal might default and the agent <u>might</u> have to pay the charges and seek reimbursement later. Cf. the testimony of the agent (Benton) regarding comparison of agency fees with the <u>risk</u> of non-reimbursement for payment to GPA and other vendors. (Tr. 386.)

Orleans, etc., cited above, 23 SRR at 1043-1044. See also Boston Shipping Association v. Port of Boston Marine Terminal Association et al., 10 F.M.C. 409, 418, 420 (1967).

My final conclusions concerned the fact that if any of GPA's tariff provisions were unclear or ambiguous or did not conform to actual practices, this did not mean that GPA's practices were unlawful. Rather it meant that the tariff should be clarified to conform to actual reasonable practices. Furthermore, the mere fact that a tariff informs users of terminal facilities that their use connotes consent to all the tariff's rules and regulations is not by itself an unlawful practice nor is the use of a separate consent form which users customarily sign. My reasons for these conclusions are based upon a number of decisions of the Commission and the courts and are discussed in detail in my rulings cited. (See 23 SRR at 780-782.) In these cases the solution to the ambiguous tariff provisions was to order the port concerned to clarify the tariff to conform to actual practices found to be reasonable, and it was also held that a "use equals consent" provision added nothing of substance to an otherwise lawful and reasonable tariff and was harmless because it could not bind any user to an unreasonable practice.

I granted leave to appeal my extensive rulings of January 16, 1986 (23 SRR at 785), the Commission heard oral argument on May 21, 1986, and on August 4, 1986, the Commission affirmed those rulings (23 SRR 1276). Among other things, the Commission remarked that in WGMA I the Commission had held that agents could become personally liable for charges accrued by their principals if it could be shown by "their prior course of conduct, normal business practices, and continuing voluntary use of the facility" that the agents had made a separate agreement with the port by which the agents would be responsible for collection and payment of certain charges. (23 SRR at 1282.) The Commission also noted that in WGMA II it had upheld tariff provisions which had defined "users" of the ports' facilities to include vessel agents, had upheld the ports' practices of relying upon agents' credit rather than obtaining security in advance from vessels, and had found that the agents could protect themselves through agreements with their principals by which the principals would advance funds to the agents. (*Id.*) The Commission fully agreed with my rulings as to the inapplicability of the classic *Volkswagenwerk* test to the question of vessel-agent liability, agreeing that vessel agents are "indirect or vicarious users" and "arrangers" of terminal services, unlike the actual or direct users in the various *Volkswagenwerk*-type cases, and agreed that principles of agency and contract law could be considered as well as regulatory policy in determining whether vessel-agent liability provisions and practices at Georgia ports were reasonable and lawful. (23 SRR at 1282-1283.)

The Commission rejected complainants' argument that GPA's tariff Item 140 embodying the vessel-agent liability provision standing alone should be found to be an unfair practice, recognizing the need for further hearings on the matter. (23 SRR at 1283.) The Commission also refused to find that GPA had abused monopoly powers in the instant case or that the unilateral imposition of tariff Item 140 by GPA by itself constituted coercion or duress, holding that these were questions of fact to be determined later. (23 SRR at 1284.) The mere fact that in a previous decision involving GPA, namely, *Southeastern Maritime Company* v. *Georgia Ports Authority*, 23 SRR 941 (1986), the Commission had found that GPA had used its superior bargaining power to impose upon crane renters unreasonable conditions exculpating GPA from the consequences of GPA's own negligence was specifically held not to be a general finding relating to GPA's other practices. (Id.)

In affirming my rulings, however, the Commission indicated that although the reasonableness of GPA's vessel-agent liability provisions and practices could be evaluated under traditional principles of agency and contract law, the issue nevertheless arose under the shipping acts and was not to be determined merely by reliance on such agency or contract doctrines. As the Commission stated (23 SRR at 1285-1286):

> The Commission's analysis in WGMA I and II went beyond the contract law questions of the meeting of minds and the voluntary nature of their arrangements to factors unique to the shipping industry, including the "normal business practice" and "prior course of conduct" of the agents and port authorities, and the peculiar relationship of the vessel agents as intermediaries between the port authorities and a variety of vessel operators. It is in the context of these relationships that port practices must be found to be "reasonable" under the Shipping Act.

The Commission therefore concluded that "it might be helpful for the future to formulate the issues in further proceeding in this case in terms of the transactional relationships for Shipping Act purposes among the port, the agents and the vessels." (23 SRR at 1286.)

After the Commission had affirmed by rulings establishing the framework of the applicable principles of law, it became necessary to develop an evidentiary record under that framework. Accordingly, a prehearing conference was held on September 4, 1986, prehearing statements were filed on October 6 and October 27 under Rule 95, 46 CFR 502.95, and a hearing was conducted in Savannah, Georgia from October 27 through 31, 1986. Twenty witnesses testified at the hearing on behalf of both original complainants and respondent as well as two expert witnesses and representatives of other agent-stevedores operating at Savannah. Fifteen documentary exhibits were admitted in evidence, many of which consisted of multi-page packages. The stenographic transcript of the hearing consisted of 863 pages. Post-hearing opening and reply briefs were filed by both original complainants, respondent, and Hearing Counsel on December 30, 1986, and February 10, 1987, and a single brief was filed by ASBA on December 30, 1986.[7]

FINDINGS OF FACT

The evidentiary record contains an extremely detailed narration of facts pertaining to the operations of the parties at the Georgia ports, especially regarding vessel agents' functions, competition among agents, financial conditions, the history of the agent-liability provisions and practices, facilities at Georgia ports, billing and record-keeping practices, and collection attempts by agents and GPA against delinquent carriers. Considerable leeway was granted to the parties, especially to both original complainants, to permit them to develop a full and complete record.[8] This was done both because complainants, having lost on

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[7] The time for filing briefs was extended on two occasions at the request of the two original complainants and then respondent, although the parties realized that such extensions would make it impossible for me to issue a decision prior to the trial of the two state court suits in which GPA was suing Harrington and Palmetto under the tariff. Because of the time consumed in hearing the appeals from my rulings and the unexpected complexity to the case, the Commission extended the time for issuance of my decision until April 24, 1987. (See Procedural Notice, January 30, 1987.)

[8] The original complainants' opening brief alone contains 109 separately numbered proposed paragraphs of facts spread over 56 pages, many of which are disputed to one extent or another by GPA and Hearing Counsel. Respondent proposes 87 numbered paragraphs of facts spread over 20 pages plus 11 additional ultimate findings of fact in its opening brief. Hearing Counsel propose their own 37 proposed paragraphs in their opening brief.

virtually every decision on the law in past cases and in the preliminary stage of this proceeding, were met with a considerable burden to establish that the prevailing practices at Georgia ports were different from those in the other cases and were, moreover, unreasonable and unlawful. Furthermore, as discussed in my preliminary rulings (23 SRR at 765-767), principles of administrative stare decisis require that if an agency departs from precedent, it must provide an opinion or analysis supported by substantial evidence of record. In other words, if the Commission were to depart from the WGMA and other decisions, it must justify and fully explain the reasons for such departure. Consequently, the parties were permitted to develop a very thorough factual record and the original complainants were give a full opportunity to support their contentions that the facts at Georgia ports were substantially different from those at the Gulf ports which were the setting of the WGMA cases.

A. THE PARTIES

1. Palmetto Shipping & Stevedoring Company, Inc. (Palmetto) is a regional steamship agency and stevedoring company doing work in the South Atlantic ports of Savannah, Georgia, Charleston, South Carolina, Jacksonville, Florida, Brunswick, Georgia, and Wilmington, North Carolina. At the port of Savannah, Palmetto represents three major principals who are regular callers. Over a year's time Palmetto will represent five to ten steamship principals. Palmetto's total capitalization for its entire business approximates 1.2 million dollars. However, agency revenue comprises only 6.18 percent of the total revenues. Of this sum, the Savannah agency operation of Palmetto averages approximately $12,000 per month. Palmetto regularly employs 50 people with only 15 in the agency

operation serving all ports. Because of the low profitability of Palmetto's agency operations, without other businesses Palmetto could not survive as a vessel agent.

2. Palmetto first began doing business in the port of Savannah through a partnership known as Palmetto Gulf and Eastern in the late 1970's. Later, the partnership disbanded with Palmetto beginning its own operation under its own name in the port of Savannah.

3. Harrington & Company, Inc., no longer a complainant, as discussed later, was a regional steamship agency and stevedoring company doing business in the port of Savannah, Georgia which until recently represented shipping lines which used the port and/or terminal facilities of the Georgia Ports Authority (GPA). Harrington & Company, Inc. is no longer in business in the port of Savannah and may now be only a non-operating owner of stevedoring companies. (Tr. 319.)

4. In the port of Savannah, Palmetto Shipping & Stevedoring Company represented Hellenic Lines, Limited from October 1, 1980 until December 15, 1983, being appointed port agent by Hellenic Lines' general agent. Palmetto acted as the vessel husbandry agent, vessel operations agent, and solicited a small amount of cargo for Hellenic vessels. On behalf of the vessels and Hellenic, Palmetto arranged terminal services with GPA. At all times, GPA was aware that Palmetto was acting as the local port agent for Hellenic Lines.

5. Palmetto represented Hellenic Lines at the port of Charleston, South Carolina for a number of years. Initially Hellenic Lines was a breakbulk service.

6. Harrington & Company was the husbandry agent and also did stevedoring for Ibero Lines, a container service operating on the East

Coast of the United States and Europe. Harrington was appointed as the Savannah agent for Ibero by Box Line Shipping, the U.S. general agent for Ibero with offices in New York. During the period that Harrington represented Ibero, Ibero and Box had representatives in Harrington's Savannah office performing agency functions associated with vessels' calls at the port of Savannah. On January 7, 1980, Harrington was appointed subagent under Box Line Shipping Agencies for Ibero at Savannah. Under this subagency agreement, Harrington performed more limited accounting, traffic, container control and customer service than the normal agency functions because of the presence in Savannah of Ibero and Box Lines owners' representatives. Harrington's functions for Ibero were primarily clerical, and Harrington received fees on a per-ship or per-container basis averaging $400 to $500 per vessel and $10 per container. The Box and Ibero representatives gave Harrington its instructions, negotiated rates for shippers and solicited cargo. Harrington assisted and collected freight moneys from shippers and consignees, but operational expenses were the sole responsibility of Ibero, and Harrington had no authority to pay GPA invoices. In essence, Harrington was performing backroom agency work. GPA was aware that Ibero had its own representative in Savannah, and there were meetings regarding outstanding Ibero invoices between GPA employees and Ibero.

7. Palmetto also had no control over the freight moneys earned by Hellenic Lines and did not have authority to pay GPA for Hellenic invoices. Palmetto was only authorized to receive invoices, audit them, and transmit them to Hellenic Lines for payment. Hellenic Lines either paid the invoices by directly transmitting money to the Georgia Ports

Authority or by transferring money to Palmetto to be transmitted on to the Georgia Ports Authority.

8. GPA actively recruited Hellenic Lines to call at the port of Savannah by offering warehouse space to Hellenic Lines as an inducement to leave the port of Charleston. At the time Hellenic was recruited to the port of Savannah, Palmetto was not Hellenic's agent in Savannah. GPA also recruited Ibero Lines to call on the port of Savannah.

9. The Georgia Ports Authority is a public terminal operator created by an Act of the General Assembly of the State of Georgia in 1945. The Georgia Ports Authority operates container facilities, break-bulk facilities, neo-bulk facilities, barge terminals, liquid tank facilities and bulk facilities. The Georgia Ports Authority is also an operating port as opposed to a landlord port. As an operating port, the Georgia Ports Authority constructs the facilities, markets the facilities, and operates the facilities.

10. The Georgia Ports Authority has facilities at all of Georgia's ports--both deepwater and inland--with the majority of its activities devoted to the state's major deepwater port at Savannah. In 1984 (the most recent year for which comprehensive statistics are available from the U.S. Army Corps of Engineers), Georgia Ports Authority facilities at the Port of Savannah accounted for 5,971,808, or 53%, of the 11,244,848 short tons of cargo moving through the port. The 6 million-ton Georgia Ports Authority total passed through the two major Georgia Ports Authority facilities in Savannah: Garden City Terminal/Containerport and Ocean Terminal.

11. The Georgia Ports Authority has constantly expanded and improved its physical plant. Its Savannah Ocean Terminal has undergone an

$18 million slip improvement project, including construction of the 1,100 x 200 ft. berth 13. The revitalization included the construction and refurbishment of 565,000 square feet to back up berth 13, plus 235,000 square feet of paved open storage. Ocean Terminal has more than a mile of berthing, nearly 2 million square feet of protected storage, 120 acres of open storage and five gantry cranes. Eventually, the terminal will become a dedicated facility, with all Georgia Ports Authority breakbulk cargo at the Savannah port crossing over the Ocean Terminal wharf. At the Georgia Ports Authority's Containerport, expansion has easily outspaced that at other South Atlantic ports. By early 1986, the Garden City Terminal/Containerport included five berths measuring 4,675 lineal feet, 245 acres of storage yard, nine high-speed container cranes, 400,000 sq. ft. of CFS space, two interchanges totaling 22 lanes, and a 68,000-sq. ft. cold storage facility backed by 198 slots for refrigerated storage.

12. The Georgia Ports Authority's Savannah Containerport is fast becoming the load center of the South Atlantic. While nearby ports lose or barely hold their own in market share, Savannah is surging ahead, with 3,776,467 tons of containerized cargo crossing Georgia Ports Authority wharves in fiscal 1986, a 28% increase over fiscal 1985. The success of this Georgia port rests on its strategic location coupled with an unprecedented commitment to expansion of the physical plant. Savannah is the farthest inland port in the South Atlantic, due south of Cleveland, Ohio. It is only five hours overland by truck from Atlanta, the destination of many import cargoes and the distribution hub of the South. Competitive rail connections also tie the port with Atlanta, with both the Seaboard System and Norfolk Southern Corporation offering overnight service

between the two points and regular service to the entire half of the country. Savannah has also strengthened its link to the Gulf. United States Line began double stack service in October of 1985 between Savannah and New Orleans, on the Seaboard System, with a western leg to Houston, on the Union Pacific. The Savannah service marked the first time a South Atlantic port had used the doublestack concept. The new train would pump cargo to and from U.S. Lines 2,241 FEU round-the-world containerships, which had been calling Savannah weekly, as well as to the carrier's Northern Europe, South American and South African services which had been calling the line's Savannah load center. Shippers using the new doublestack service could have expected to save in the area of 20 percent in rail costs as compared to the former single stack service offered. U.S. Lines was but one line to choose Savannah as a load center. Over the last two years, over a dozen steamship lines have selected Savannah, most specifically Containerport (located at the Garden City Terminal) as their load center. But U.S. Lines was by far the carrier most affecting the Savannah port scene.[9] In 1986, the carrier handled more than 175,000 containers through the Georgia port, as compared to only 42,000 in 1982. The 1986 container volume for U.S. Lines translated into 1.8 million tons of containerized cargo moving through the port. Other steamship lines recently choosing Savannah as a load center include Barber Blue Sea, CGM, Ecuadorian, Evergreen, Hapag-

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[9] Within a month after the hearing in this case concluded, on November 24, 1986, United States Lines petitioned for reorganization under Chapter 11 of the Bankruptcy Code, and it has announced various eliminations of services. Therefore, the facts developed at the hearing based on past experience and expectations must be considered in light of these subsequent events. The fact that USL has filed and that its services will be changed can be officially noticed under 46 CFR 502.226(a).

Lloyd, Incotrans, Landmark, SCI and United Arab. Nedlloyd and Zim Lines both expanded their services in calendar year 1985. For Barber Blue Seas, the centralization in Savannah has meant the elimination of direct calls to Gulf ports. The line is now moving southern and southwestern cargoes to and from Savannah. With the addition of the world's three largest Ro/Ro vessels to its fleet, BBS's increased capacity and improved frequency at Savannah have more than doubled the carrier's cargo tonnage through the port. GPA has made it a point to stay one step ahead of the boom. In early 1986, Savannah put three 45-ton, high-speed cranes in operation, bringing the total at the Containerport to nine. The three new cranes serve the recently completed container berth 5, which by itself has 65 acres of payed container storage. Total acres dedicated for container storage at the Containerport number 245.

13. GPA's annual revenue for fiscal 1986 was $53,003,000. The aggregate assets for GPA are approximately $352,000,000.

14. At the port of Savannah, the Georgia Ports Authority owns and operates the only dock facilities on the Georgia coast which are equipped with container-handling cranes and modern container storage facilities. These container facilities are called "Container Port". The nearest comparable facilities to Container Port are located at Charleston, South Carolina and Jacksonville, Florida. Southeastern Maritime Company v. Georgia Ports Authority, 23 SRR 530, 536, I.D., adopted, 23 SRR 941 (1986). As a practical matter, GPA owns and operates the only public terminal at the port of Savannah that can handle containers with shore-side cranes. The only other public terminal that could conceivably handle containers, East Coast Terminals, has no container cranes, has only three berths, and to off load containers, the ship must have its own

ship's gear capable of off loading containers. Although East Coast Terminals could theoretically handle a container, it is not economically feasible for containerized cargo to utilize East Coast Terminals. The vessel would have to be small and self contained, i.e. have its own ship's gear to off load a container, and there are not many self-contained container vessels in existence any more. GPA concedes that East Coast Terminals is a small operator and that GPA handles 90 to 95 percent of all containerized traffic passing through the port of Savannah, and handles over 53 percent of all short tons of cargo passing through the port of Savannah. In effect, GPA has the only self-sufficient container facilities in the port of Savannah. East Coast Terminals operates the only other public breakbulk facility in the port of Savannah primarily limited to forest products and steel but it can only handle three small vessels at one time compared to GPA's capacity of fourteen. In fact, East Coast Terminals considers itself an annoyance rather than a competitor of GPA.

15. GPA maintains trade development offices in Savannah, Georgia; Brunswick, Georgia; Atlanta, Georgia; New York, N.Y.; Chicago, Illinois; Athens, Greece; Oslo, Norway; Hong Kong; and Tokyo, Japan, all of which offices are staffed by full-time GPA employees whose duties include recruiting steamship lines to call on the GPA facilities at Savannah. In addition to these offices, GPA, through contract, maintains a trade development office in Seoul, Korea.

16. As noted earlier, GPA brought suit against Harrington & Company and against Palmetto in State Court in Chatham County, Georgia, alleging that Harrington owed GPA $114,144.72, and that Palmetto owed GPA $118,140.54, for services which GPA provided to these agents' principals,

Ibero Lines and Hellenic Lines, respectively. The charges sought to be collected from Harrington and Palmetto covered a wide variety of services. After the suit commenced against Palmetto, Palmetto remitted $55,503.22 for certain items, leaving a balance of $62,637.32. After a trial before a jury, on January 13, 1987, the jury verdict and judgment of the court awarded GPA exactly one-half of the outstanding claims, i.e., $31,318.66, plus post-judgment interest and costs. As to the Harrington suit, the jury verdict and judgment was for $54,162.86, plus post-judgment interest and costs, about one-half of the claims stated above. (See judgments attached to complainants' reply brief.) Thereafter, on February 26, 1987, complainant Harrington filed a notice of its withdrawal of its complaint, which notice contained the concurrence of GPA. On the same day, complainant Palmetto with the concurrence of GPA, filed a notice of withdrawal of portions of its complaint relating to its request for reparation but "without prejudice to its additional claims and specifically without prejudice to its claim for declaratory relief both as to the present and future" and without withdrawing its complaint "against the present practices and tariff of the GPA set forth in its complaint in these proceedings." (See withdrawals of complainants, served February 26, 1987.)

B. VESSEL AGENCY FUNCTIONS AT THE PORT OF SAVANNAH

17. Historically a vessel agent's functions can be broken down between operational work and husbandry work. In husbandry work an agent takes care of the vessel's needs which include physical handling of customs works and entering and clearing of the vessel as well as taking care of crew members and providing necessaries. Operational work

includes tending to the vessel lines' needs as opposed to the vessel's needs. Frequently this will include handling sales functions and disbursing freight moneys that are collected. Vessel agents are also distinguished between general agents and local or port agents. A general agent is responsible for all ports at which a vessel calls or a line operates. A port (also called a local or sub-agent) is responsible only for a particular port on a particular voyage. The port agent's function can include both husbandry work and sales work.

18. Historically a husbandry agent performing services in one port will work for a flat fee per vessel which normally runs between $800 to $1,200 per port call. An agent having sales responsibility usually works on a percentage of the manifest or a percentage of the freight booked by shippers due to the efforts of the vessel agent. This percentage may run anywhere from one and one-quarter percent of the manifest to three percent. Traditionally the vessel agent will perform the full panoply of services for liner service but will only provide husbandry services for tramp vessels or spot-charter vessels.

19. Vessel agents at Savannah do not today all operate in the traditional fashion with regard to payment of port charges. Today some vessel principals instruct their agents not to pay invoices. In such cases, the agents are requested to approve invoices to make sure they are correct and transmit the invoices to the vessel principal who in turn will pay GPA directly. This practice may have come about in the past year. Some agents testified that principals reimbursed the agents for the agents' disbursements but that sometimes the vessels paid GPA directly. One agent witness, on behalf of Southeastern Maritime Company (SEMCO), who are agents and stevedores representing 10 to 15 vessel

principals at Savannah, testified that the majority of their principals pay directly to vendors providing services at Savannah and that any new accounts "are demanding that they pay direct, and they do not authorize us to pay and if we pay they will not reimburse us." (Tr. 409.) Other agents testified that they continue to perform their roles as a liaison or intermediary between the vessel operator and all the service vendors in the port.

20. On the average, GPA's terminal charges per vessel call are ten times greater than the agency fees collected by an agent. For example on a tramp vessel, port charges would range from $10,000 to $15,000 with the agent receiving approximately $1,000 in fees. For regular liner service, a vessel calling at GPA's facilities would incur $20,000 in terminal charges with the agent receiving a $1,500 to $2,000 fee.

21. A vessel agent interfaces with GPA in a number of ways. When an agent is notified that a vessel is going to call at GPA's facilities, the agent will contact GPA to arrange for a berth which is suitable for the operation as contemplated and any services which will be needed. The agent may also notify GPA as to any special requirements for certain types of cargo which may be unloaded for that vessel's call. If the vessel is a containership, the agent will become more involved in the actual delivering, handling, and storage of the containers than it would for the receipt, delivery and handling of storage of breakbulk cargo.

22. The first contact an agent like Palmetto has with GPA regarding a vessel call is the notification to GPA's operations department that a vessel is arriving. The agent notifies GPA of the type of operation of the vessel, the name of the steamship line, the name of the operator of the vessel, and other particulars that are necessary in order to enter

the vessel. Previous to the contact the agent has with GPA, the agent will receive a message from its vessel principal in which the agent is notified of the estimated time of the arrival of the vessel and the particulars about the vessel including the draft and any special requirements the vessel may have. The vessel principals will also notify the agents as to which terminal the vessel will be calling at. Regarding a particular berth or a particular terminal within GPA's facilities, the arrangements are coordinated between the vessel principal and GPA and the vessel agent depending upon the needs of the particular vessel and the type of cargo to be loaded or unloaded.

23. Regular liner services transmit a schedule each month to their agent indicating when a vessel is due at the port of Savannah. As the date approaches for the arrival of the vessel, the estimated time of arrival is updated. Regularly GPA communicates with the agents requesting a schedule of anticipated vessels calling at the port. As the agents receive estimated updates on vessel calls, the agents will communicate with GPA by telephone as to the exact arrival date and any updates on services needed.

24. GPA's ship's operation department is notified of the vessel that is scheduled to call and the shipping line running the vessel. In addition, particulars of the vessel such as draft of the vessel, and length of the vessel are given. If the vessel is a new vessel, GPA will refer to the Lloyds Registry of Vessels to determine the particulars of the vessel.

25. No berth assignment form, dock form, or any other writings are signed by an agent when arrangements are made for the berthing of the vessel. All arrangements are done by telephone or telex.

26. Three days in advance of the vessel's call, the agent will send out discharge or load orders indicating what cargo will be discharged or loaded onto the vessel. Once the vessel comes to the dock, GPA is informed of the work times of the vessel and when the vessel will be sailing. Shipping orders will be signed and transmitted to GPA telling GPA to whom the cargo will be released. For export cargo, GPA will sometimes call the agent requesting billing instructions in order to bill handling charges. On container vessels, telex releases are sent to GPA so that containers may be released to importers. In addition, GPA is transmitted orders to move containers internally if such is needed. Once a ship sails, invoices are transmitted to an agent like Palmetto, the agent reviews the invoices to make sure they are correct, and then they are transmitted on to the line for payment.

27. Before the vessel arrives, an agent like Palmetto receives a manifest for import cargo indicating what is on the ship for discharging at Savannah. The information is retyped onto a form for GPA's benefit. These forms give the commodity, the piece count, the weight, and the marks and numbers. For export cargo, the list will give the shipper and freight forwarder, the piece count, the description of the commodity, the weight, the marks and numbers, and whether the cargo came in by truck or rail. In addition, GPA is given an estimated number of working hours of the vessel.

28. All the information described above and provided three days prior to the vessel call is sufficient for one to estimate dockage and wharfage on a particular vessel.

29. Agents like Palmetto sometimes arrange services with other vendors on behalf of the vessel such as pilots, towing companies, line

handlers, and docking master. Sometimes other vendors hold vessel agents like Palmetto responsible for the vessel's invoices.

30. Vessel agents also prepare pro formas on most vessels which they represent. These pro formas indicate the estimated cost of the vessel's call including all charges incurred in the port of Savannah. These pro formas are prepared anywhere from forty-eight hours to two weeks prior to the vessel's call. A pro forma can be prepared in 15 minutes to half an hour and is usually highly exact being off no more than plus or minus ten percent.

31. The function an agent performs and the role it plays in representing a vessel have greatly changed since the mid 1970's. First, very seldom will an agent have any sales functions for a line or vessel. Second, very seldom does an agent have authority to pay bills for services generated at the Georgia Ports Authority. Typically an agent only audits the bills to determine the correctness and then passes them on to the principal for payment. Where an agent does have authority to pay an invoice on behalf of the vessel principal, the agent does not have the funds in order to pay the invoices. Sometimes an agent may receive advances from a vessel operator, but steamship lines do not typically place an agent in funds, and the vessel agent does not generally handle or collect freight moneys. Freight moneys are paid for the most part in locations other than at the port of Savannah. When freight moneys are collected, vessel principals require that freight moneys be immediately transmitted to some point other than the port of Savannah or be deposited in a local account. An agent is prohibited from using these freight moneys to pay outstanding invoices at the Georgia Ports Authority and is further prohibited from using any interest earned on these moneys.

Moreover, recently it has become more and more prevalent for freight moneys to be assigned over to a financial institution. Also on many vessels which call at the port of Savannah two agents will represent the vessel, one performing husbandry matters and one attending to the operations side of the vessel services. This typically occurs where a line has a local office in Savannah.

32. Vessel lines are also changing as far as their representational needs. The single largest user of GPA's facilities did not use a local agent. For instance, in 1986 United States Lines accounted for forty percent of all cargo moved through the Georgia Ports Authority facilities. For containerized cargo U.S. Lines accounted for sixty percent of all containerized traffic. However, U.S. Lines established an office in Savannah and performed agency functions in-house. Vessel lines controlling the majority of cargo passing through the port of Savannah were under written lease agreements with GPA and did not employ local agents. (The bankruptcy of U.S. Lines, mentioned earlier, may have a substantial effect on the situation, however.)

C. HISTORY AND IMPACT OF ITEM 140

33. GPA has had item 140 in its tariff since May 1, 1963. The original Item 140, while similar to current Item 140, was not identical, however. In pertinent part the original Item stated (Exhibit 8):

> On each shipment moving into or out of the port by water, the local party performing the forwarding function shall be responsible to the terminals for payment of all terminal charges on such shipments, and these charges shall become the obligation of the party performing the forwarding. However, the GPA reserves the right to hold the vessels, their owners, and agents who load or discharge cargo at the terminals liable for payment of all terminal charges on such shipments which may have accrued, as well as any charges which may accrue from the

> removal of such cargo to another part of the terminals or storage elsewhere.

The tariff also contained an Item 145 relating to a "delinquent list" and named "all common carriers, vessels, their owners and/or agents, or other users of the facilities of the [GPA] terminals" who could be placed on the list and denied use of the facilities until charges had been paid. (Exhibit 8.) Item 140 also referred to agents as "users" and to the list.

34. GPA's tariff was changed to some extent in 1975 to adjust to containerization and for other reasons. The current Item (effective January 11, 1984), while retaining some of the early language in the 1963 tariff Item 140, adds certain language. The critical language is as follows:

> On all vessels calling at the terminals of the Georgia Ports Authority the local agent shall be responsible to the terminals for the payment of all dockage and related charges, including wharfage.

Current Item 140 retains the language of the 1963 tariff regarding GPA's reserving of its "right to hold vessels, their owners, and agents liable for payment of all terminal charges," etc., and continues to name vessel agents as "users" of the terminals who can be placed on a "delinquent list," as does current Item 145.

35. According to the original 1963 tariff items, therefore, at a time when cargo was exclusively breakbulk, terminal charges were assessed against the freight forwarder or customhouse broker. If these two parties did not pay, then the vessel agent or owner would be assessed. According to GPA's present testimony, the practice now is for cargo charges to be assessed against the forwarder or broker while vessel

charges are assessed against the vessel agent although agents testified that, in certain instances, a vessel agent may be called upon to pay cargo charges (inbound and outbound storage and handling) if a shipper or consignee is not on GPA's credit list. Therefore, since May 1, 1963, GPA has had provisions in its tariff making parties who acted as agents for either vessel or cargo responsible either jointly or as co-obligors for their principals' debts.

36. Although Item 140 placing responsibility on vessel and other agents has been in effect since 1963, up until the late 1970's and early 1980's the Item has not apparently been a major source of trouble because, up to that time, vessel principals would either pay directly or eventually place their agents in funds and there was little need to consult the tariff. Some agents therefore, apparently believed that GPA only considered vessel agents to be conduits for payment from their principals or that Item 140 meant that the agents were only expected to cooperate with GPA in efforts to collect charges. However, with the advent of the recession in the shipping industry in the late 1970's and thereafter, principals more and more frequently failed to pay their bills with the result that GPA turned to the vessel agents for payment under the tariff who were not reimbursed by their principals.[10]

37. In all the years in which the vessel agents have operated at Savannah under Item 140, GPA never affirmatively advised the agents that agents would not be held responsible for charges under that item.

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[10] The situation was summed up by Mr. Benton of SEMCO, a leading agent and stevedore, who testified that he objected to Item 140 but that "the problem has only arisen that had been there. The occasion to be concerned over it has only arisen. Now maybe we could have been concerned about it many years ago, but if something doesn't concern you, you don't make issue with it--or we didn't." (Tr. 392.)

Furthermore, neither complainant nor the Savannah Maritime Association, an association of local steamship agents, complained to George Nichols, GPA's Executive Director, about Item 140. There was, however, a number of instances in which agents complained about particular billings over the years, and in 1975 the Savannah Maritime Association did file a formal complaint with the Commission regarding GPA's wharfage billing practices. Moreover, agents testified that GPA's practices regarding holding agents responsible were not always consistent and that on some occasions invoices sent by GPA to a vessel agent were sent back to GPA and rebilled to a carrier.

38. Although there might have been some misunderstanding and confusion by some agents, GPA has over the years sought to enforce Item 140 against certain agents. According to Charles Parkinson, GPA's Director of Finance, GPA has filed suit or otherwise sought collection against a number of forwarders, brokers and vessel agents beginning in the 1970's. (Tr. 759-760.) Suits or other collection efforts were brought against Hellenic Agencies, Stevens, Kaufman, Eller & Company, Tilston Roberts, Street Brothers, Smith and Kelly, and Harrington between 1973 and 1984. Of course, there were two suits filed in the State Court against Harrington and Palmetto, mentioned earlier. The suits and efforts against vessel agents included vessel charges such as wharfage and dockage.

39. GPA's decision to place responsibility on vessel agents was a unilateral decision and, although published in the tariff on notice, was not taken after consultation with agents or after public hearings. However, provisions similar to GPA's Item 140 are contained in tariffs at Wilmington, North Carolina, Charleston, South Carolina, Jacksonville,

Port Everglades, and Miami, Florida, Houston, Texas, and Mobile, Alabama. (Exhibit 15; Tr. 806.) New Orleans and Baltimore are landlord ports and not operating ports. In addition, East Coast Terminal in Savannah has the identical provision in its tariff although it bills differently. There are certain differences in the facts at Houston and New Orleans, however, as the WGMA cases found, and agents were given commissions to act as collectors for those ports. These provisions at other ports generally make forwarders or brokers responsible for cargo-related services and vessel agents responsible for vessel-related services. At Wilmington, North Carolina, furthermore, the tariff provides that "no vessel owner or vessel operator, or agent thereof, shall be invoiced for, looked to for, or expected to pay, any terminal charges assessed against cargo except with the prior consent in each instance of such vessel owner, operator or local agent." (See Wilmington tariff, Item 45, Exhibit 15.)

40. In 1971 or thereafter, GPA, in keeping with a decision of the South Atlantic Marine Terminal Conference, of which GPA is a member, determined that vessel agents would be responsible for all charges relating to containers. This decision appears to be based on the practice at other ports where the lines were including container charges in their freight rates so that if the rates were the same at Savannah, charging cargo interests might have resulted in double billing. Furthermore, the identities of the shippers and customers of the container carriers were treated as confidential by the lines, making it difficult for the GPA to ascertain whom to bill. In 1975, GPA also decided to switch wharfage charges from cargo interests to vessel interests. GPA has on occasion required assurance or guarantees of payment before

allowing the use of its facilities. For example, it required the principals of a new joint stevedoring venture organized by Strachan Shipping Company and Southeastern Maritime Company to guarantee payment of charges, required an agent of Farrell Line to guarantee payment of charges before allowing a Farrell vessel to dock, and once required an agent to post cash on behalf of a principal in the agent's name. GPA's previous indemnification provision in its tariff requiring stevedores to indemnify GPA even if GPA were negligent, of course, has been found to be unlawful by the Commission. (See Southeastern Marine Maritime Company v. GPA, 23 SRR 941 (1986).)

41. The placing of liability on vessel agents by GPA's tariff Item 140 has caused agents significant problems. Although sometimes it can be done (Tr. 328), agents cannot easily insist that vessel principals advance cash to them for payment of all GPA's charges because other agents do not so insist and the insisting agents stand to lose the business to the other agents who make no such demands. The size of GPA's charges compared to individual vessel agency fees can cause serious problems if agents must develop the capital to pay the charges without reimbursement. A defaulting principal can cause serious financial hardship in a particular case. For instance, Palmetto testified that to recover its losses as a result of the default of its principal Hellenic Lines, it would have to increase its agency fees at Savannah by more than 100 percent. Agents testified that they have been unsuccessful in trying to get GPA to place lines on a cash basis and that GPA has refused to do so in every instance when requested. However, in a deposition of Charles Wynn, GPA's Credit and Collections Manager, he testified that some accounts have requested and a line has been put on a cash basis by GPA.

(Exhibit 14 at 32-35; 37; 39-41.)[11] Such requests were to be directed to Mr. Parkinson, Mr. Wynn's supervisor, for discussion with GPA's Executive Director, Mr. Nichols, but Mr. Parkinson testified that he received no such requests. (Tr. 756-757.)

D. THE AGENTS' REVENUES AND RESOURCES

42. For the past six years, 6.18 percent of Palmetto's total revenues have been derived from its agency operations. Its current agency revenues average $400,000 per year (Tr. 79.) Its total agency revenues in 1983 amounted to $700,000. (Tr. 95.) Approximately 90 percent of Palmetto's revenue is derived from stevedoring operations. (Tr. 98.) A former official of Harrington estimated that Harrington's stevedoring operations produced in the neighborhood of 75 to 80 percent of its net profits. (Tr. 473, 474.) A representative of another agent-stevedore, Stevens, testified that approximately 80 percent of Stevens' gross revenue was generated by its stevedoring operations. For companies which are agents and stevedores, the stevedoring operation is therefore by far the dominant one in terms of revenues. Often a company such as Palmetto will perform agency services in order to acquire the stevedoring work for the vessel although there are instances in which a company performs stevedoring without being the agent and vice versa. Of the six agents or stevedores who furnished or employed witnesses, five of them performed agency and stevedoring operations (Harrington, Palmetto,

[11] The line was CPV, the Peruvian government-owned carrier, whose previous agent apparently went out of business, and which line became delinquent in its account with GPA. CPV secured a new agent who apparently worked out an agreement with CPV by which CPV agreed to give the agent substantial advance payments. (Exhibits 14 at pages cited above.)

Strachan, SEMCO, Stevens) while one company operated as contract stevedores (SECO). As noted earlier, both Palmetto and Harrington are regional agency and stevedoring companies operating at a number of ports (although Harrington no longer operates at Savannah). Strachan Shipping Company also performs agency and stevedoring functions at ports around the country, East, Gulf, and West Coasts, and represents about 30 liner and non-liner principals in Savannah alone. (Tr. 324-325.) Strachan, being in the top five agencies in size operating at Savannah, has demanded cash advances from its principals on occasions and has turned down their business although making such demands "is a tricky business." (Tr. 328.) Southeastern Maritime Company, a subsidiary of Peoples Industries, are agents and stevedores operating at Savannah, Jacksonville, Charleston, and Miami, and represent about 20 vessel principals. (Tr. 366-367.) Its witness, Mr. John Benton, Vice President of Finance, testified that today more and more vessel principals are instructing SEMCO not to pay the invoices but to approve them and send them on to the principals to pay directly to GPA. (Tr. 372.) He has no objection to the lines' paying GPA's bills directly. However, he does object to not knowing whether their principals have paid GPA and, if not, being held responsible for the payment. (Tr. 393-394.) Stevens operates as agents and stevedores in Savannah and Charleston, represents 10 to 12 liner principals and 25 to 30 tramp operators per year, and is one of the top five operations at Savannah. (Tr. 427-429.) Stevens is owned by Kerr Steamship Company, Inc., a very large steamship agency company. (Tr. 435.) Stevens performs stevedoring on about one-half of the vessels for which it acts as agent. (Id.) It has been estimated that when Harrington &

Company had been an operating company, it earned about 30 million dollars from all the ports it served. (Tr. 320.)

43. Vessel agents testified that they do not have the resources, financial or otherwise, to do financial background checks on their principals and that although they could refuse to do business with those principals who refused to provide financial information, an agent could not stay in business if it refused to do business with such principals. Vessel agents can use the services of reporting services in the maritime industry such as ECS Marine, which is similar to Dunn and Bradstreet. ECS Marine, however, does not have financial information on thirty percent of the principals, and thirty-five percent of the reports, it was testified, are inaccurate. The agents testified, furthermore, that they did not have the financial resources to visit their principals directly and request financial information and that those principals on whom agents were able to call have refused to release financial information. An agent testified that GPA would have an easier time obtaining financial information because a line would choose to stay in Savannah because it was the best port for its operations. (Tr. 725-726.) However, deficiencies of these reporting services would also affect GPA and, although GPA maintains sales offices in foreign countries, it does not permit personnel in those offices to involve themselves in credit matters. GPA's witnesses, furthermore, testified that GPA does not know and is not necessarily in contact with all the vessel interests which use its facilities and that it was not staffed to determine the creditworthiness of all vessel owners and operators calling at Savannah. Even some agents' witnesses conceded that GPA's ability to obtain credit information on small single ship or charter operators would be no better than

the agents'. (Tr. 419, 727.) Vessel agents do not choose the port at which a particular vessel will call and have very little input as to the particular terminal to be used, these matters being decided by shippers and charterers based on the need for particular facilities. The agent is actually selected because a vessel is going to call at a port, and within the port the cargo and facilities dictate which terminal the vessel will call.

44. Ships' agents undertake efforts to market their services to vessel lines. This marketing is done by the agent calling on the general agent for a steamship line or the steamship line itself and making presentations trying to convince them to use the agent at the port of Savannah. However, these lines that are called on by the agents have already chosen to do business at the port of Savannah. Where a vessel line is located overseas, an agent will not call on the line. Overseas trips by a local vessel agent are cost prohibitive.

E. GPA'S MARKETING RESOURCES AND BILLING PRACTICES

45. GPA has some awareness of the identity and financial credibility of the vessel principals which agents represent. GPA engages in extensive marketing efforts to recruit steamship lines to call at the port of Savannah. Through this marketing and recruiting effort, the GPA recruited the majority of the vessel lines calling at Savannah. Further, GPA has day-to-day dealings with vessel operators who maintain local offices. Through GPA's offices around the world, GPA's marketing staff will regularly solicit steamship lines to call at the port of Savannah. When an agent such as Palmetto is doing a background check on a vessel operator, it will contact GPA to receive updated information regarding

the operator including checking the vessel under GPA's copy of the Lloyds Registry of Vessels because GPA's knowledge of the vessels and the operators is superior to that of the agent's. Even after a vessel principal has begun calling at the port of Savannah, GPA will regularly visit the principals and have direct dealings with them. Through the solicitation efforts and direct dealings between GPA and the vessel principals, GPA will know these vessel principals fairly well. Those few operators of which GPA has little or no knowledge, i.e. spot charters and non-regular tramp vessels, are usually in a better financial position to pay GPA charges and usually pay in advance. Among the container lines the GPA has recruited to Savannah are U.S. Lines, Hanjin Container Lines, Hapag-Lloyd, Evergreen Marine, Maersk Lines, Scan Barber Lines, Yangming Lines, Zim American Lines, and United Arab Lines. All these lines are recruited by a GPA team consisting of the marketing people and the executive director of the GPA and all are under written lease agreements with the port. Together these lines under lease agreements account for 70 percent of all containerized cargo at GPA.[12] The majority of the lines under the lease agreements with GPA, accounting for the majority of the containerized cargo passing through the port of Savannah, have direct credit arrangements with GPA and pay all of their invoices directly. However, if a vessel agent arranges for berthing of a vessel for these lines, the agent will receive the bill for certain services. However, if the services are ordered by the line and the line instructs that the bill be transmitted to the agent, GPA will bill those services to the agent. GPA does not differentiate among various types of agents in these

[12] As noted earlier, the reorganization of United States Lines, a major tenant, will probably affect the situation significantly.

instances, for example, whether the agent to be billed is a husbandry agent or whether the line is instructing GPA to bill the line's local in-house agent.

46. As GPA looks to the agent ordering the service or follows the agent's instructions as to who is to be billed, if a vessel is represented by more than one agent, for example, husbandry or other outside agent and local in-house agent for a line with a leasing agreement with GPA, GPA will bill the agent according to the instructions of the in-house agent even though the other agent is not a party to the leasing agreement and that agreement states that the line is responsible for payment of all terminal charges. GPA does not question the decision between the line's local office agent and the outside agent as to who will be billed. Mr. Rollison, GPA's Director of Operations, testified that when Palmetto has been the outside agent, Palmetto has agreed to be billed under these circumstances. (Tr. 834-840.)

47. All charges associated with services rendered to containers, including demurrage, are billed to the vessel agent if one exists or to the line. Regarding breakbulk cargo, if the shipper, consignee, or forwarder is on GPA's credit list, all handling and storage charges are billed to those cargo interests. If the cargo interest does not pay the bill, the vessel agent has been sent the bill by GPA. (Tr. 332; 498.) GPA will give agents the names of parties that are on GPA's credit list but does not furnish the list itself. These practices are not set forth expressly in GPA's tariff. Nevertheless, GPA states that storage on breakbulk inbound cargo (inbound demurrage) is not considered to be the responsibility of the vessel interest, and GPA's Director of Operations, Mr. Rollison, testified that the cargo interest, not the vessel agent,

is billed for handling and storage on import breakbulk cargo. (Tr. 854-855.)

48. When an agent receives an invoice that would normally be billed to a shipper, broker, or forwarder, if those parties were on GPA's credit list, an agent would try to collect from those parties and transmit the money to GPA. However, if the money is not collected, GPA has asked an agent like Palmetto about payment of the bill (Tr. 220) and has billed other agents (Tr. 332). On breakbulk cargo, the agent does not order handling or storage services. An agent like Palmetto also contacts shippers or forwarders to advise them to pick up their cargo timely so that demurrage (storage) charges can be avoided. (Tr. 219-220.)

49. For containerized cargo, whether inbound or outbound, computer-generated invoices are rendered and sent to the vessel agent for the account of the particular line involved. Charges included as container charges are: truck arrival, truck weighing, rail arrival, premount units, demount units, transfer chassis/chassis, relocate units, swap chassis, transfer and premount, weigh units, rehandle to weigh, U. S. Customs inspection, truck departure, rail departure, rehandle to container freight station, deliver to container freight station, rehandle from container freight station, received from container freight station, and storage. All these charges are billed to the vessel agent regardless of which party requested the particular service for containerized cargo. For example, according to the agents, if a consignee requests that a container be moved to some other location for stripping or stuffing, the vessel agent will get the bill from GPA. (Tr. 534.) However, GPA testified that it will not accept instructions for services to containers from anyone other than the line or its agent. (Tr. 876, 890.) The

reason for this is that GPA considers that the containers are always under the control of the line and its agent (Tr. 801-803), and if GPA were to accept instructions for services from other parties, the line or agent, according to GPA, would be justified in refusing to pay, and movement of containers would be delayed if cargo interests had to be billed. (GPA opening brief at 10, PFF 46, and record citations therein.)

50. For breakbulk cargo, there is no equivalent charge for truck arrival, truck weighing, rail arrival, and the charges relating to demounting or mounting containers. Instead, all of these charges are listed as handling charges. These charges are traditionally billed to the forwarders, shippers or consignees unless, as noted, these parties are not on GPA's credit list, in which case the charges would be billed to the vessel agent.

51. On containerized cargo an agent supplies for import containers the trucker and container number. On export cargo, the GPA has a truck bill indicating the container number, the weight, the port of destination, and the ship it applies to. All the information that is supplied on breakbulk cargo regarding shipper, consignee, importer, and destination is available for containerized cargo but GPA never requests this information. GPA also bills the agent for all charges on pier containers, which are containers that are going to be carried no farther than the pier on import cargo.

52. Truck arrival is a charge that is incurred when an arriving container passes through the GPA gate, and truck departure is a charge incurred when the container passes through the gate out of GPA's premises. GPA considers these charges to be administrative charges to the vessel for maintaining inventory and control on containers moving into

and out of GPA's facilities. (Tr. 801-803.) Weigh on arrival is a charge for containers being weighed at the GPA. Rail arrival is a charge for containers arriving by rail into GPA's facilities. Rail departure is the charge for passing through the gate on the way out of the GPA. Premount unit charge is the charge for mounting a container on a chassis, and demount charges are for moving a container from a chassis. Transport chassis is a charge incurred where a container is moved from one chassis to another. Relocate units charge is a charge for movement of containers within an area of the GPA. Rehandling to weigh is a charge for moving a container from the weighing station. U.S. Customs inspection charge is a charge for breaking the seal on a container being inspected by U.S. Customs. Rehandle to container freight station is a charge for a container being moved to the container freight station for stripping or stuffing. Containers are handled at container freight stations in order to remove cargo from or to load cargo into a container.

53. LCL Containers are containers containing less than a full load of cargo for one shipper or consignee. On inbound LCL containers, containers are moved to the container freight station shed for stripping. The converse is true for outbound containers.

54. Storage billings on containers are billed after expiration of free time. Whether a container is inbound or outbound, empty or loaded, and irrespective of the provisions of the bill of lading, the vessel agent will receive the bill for storage. (Tr. 239.) On breakbulk cargo, as noted, an agent will receive the bill if the importer is not on GPA's credit list, although GPA's witnesses testified that the cargo interests are billed. (Tr. 796, 896.)

55. Vessel agents have only one account at GPA. GPA does not send monthly statements indicating vessel principals on unpaid accounts. Instead, the monthly statements indicate moneys owed irrespective of principals. However, GPA also sends invoices and backup documents to the agents showing, among other things, the vessels involved. Item 150 of GPA's tariff provides, in part, that all payments made by an agent may be applied to the oldest outstanding invoice irrespective of the vessel principal involved. However, GPA states that it does not enforce Item 150 and "is taking steps to delete that portion of Item 150." (GPA Reply Brief at 9, para. 88; see also Ex. 14 at 49-51.)

56. When a steamship agent is fired by its principal, or resigns, and no new agent is nominated by the vessel line, the steamship agent continues to receive bills for container storage accruing after that date. The ex-steamship agent will continue to receive these bills until a new agent is appointed.

57. For services ordered on a container, such as taking the container out of the stack so that it can be stripped or stuffed, the vessel agent gets the bill even if it is a consignee who wanted the service performed. If a consignee or shipper wishes services to be performed on a container, GPA requires all instructions to come through the vessel agent. GPA considers that containers remain under the control of the line or agent until the container is interchanged out of GPA's premises.

58. GPA has a computer system set up to keep track of all containers and to keep track of all storage charges. The computer also keeps track of who the agent is, what the line is, whether the container is empty or loaded, and whether the container is import or export. The GPA also maintains computer printouts for container storage charges

identifying whether the container is empty or loaded, import or export, and identifying the unit number, how many days the container has been in storage, and the vessel and chassis number. If the container has been brought in by truck or rail, the print out also identifies who brought in the container. It is possible for GPA to put into its computer the names of the broker or forwarder on containerized cargo but GPA has not yet included that information in its computer program. The GPA does have knowledge regarding the commodity inside containers and actively inquires as to this information. GPA also has access to manifests, although sometimes a line will cover up the customer line of the manifest.

F. GPA'S POSITION ON BILLING CHARGES

59. Once a service is performed, GPA generates an invoice or bill for the service performed. Generally, charges for services to containers are billed to the vessel agent or line on the theory that the containers remain under the control of the carrier until they are interchanged out. Although there is some dispute as to what GPA says it does and what the agent claims to happen, GPA states that it breaks down its charges and bills them in the following manner. General charges, i.e., non-container charges, according to GPA are billed as follows. (Tr. 895-896; 795-796.)

(a) Dockage - Vessel's agent
(b) Wharfage - Vessel's agent
(c) Water - Vessel's agent
(d) Clerks for Vessels - Vessel's agent
(e) Special Services - Party requesting the service
(f) Labor and equipment - Party requesting the service
(g) Inbound storage - Cargo
(h) Inbound handling - Cargo
(i) Outbound handling - Cargo
(j) Outbound storage - Cargo

60. Notwithstanding the above testimony and position, agents testified that vessel agents would receive bills for inbound and outbound storage and handling on breakbulk cargo if the shipper or consignee was not on GPA's credit list. (Tr. 217; 331-332; 498; 534-535.) None of these types of charges was involved in the two state court suits, and complainant has stated that, for the future, the Commission can resolve the factual dispute by ordering GPA to stop billing vessel agents for these charges either directly or secondarily, unless the vessel agent expressly agrees to be billed for such charges. (Complainant's Reply Brief at 43.)

61. Instructions to GPA for billing of handling and storage on export cargo are contained in the loading orders provided by the vessel agent and on some occasions the agents will instruct that they be billed. If a party designated on loading orders does not have a credit agreement with GPA, these charges are billed to the vessel agent. There are also special situations in which the vessel interests are billed for handling and storage on inbound cargo, for example, cargo destined for another port and landed by mistake or otherwise at the GPA's facilities and cargo arriving in bond and still under the control of the vessel.

62. As noted, all charges for services in connection with containers are billed to the vessel line or its agent. (Tr. 873.) Some agents testified that if a service is to be performed for a container, a consignee, forwarder, shipper, or other cargo representative must have the service requested through the vessel agent. (Tr. 827-828; 534.) Sometimes an agent will only order a berth assignment and the line itself will act as its own agent for other services requested. On occasion, a line (Hanjin) acting as its own agent and having a lease agreement with

GPA, has agreed with Palmetto that Palmetto would be billed for certain container-related services. (Tr. 835-836.)

63. As noted earlier, GPA decided to bill container-related services to the vessel interests, i.e., line or agent, as a result of a decision of the South Atlantic Marine Terminal Conference, its belief that at other ports charges for these services were included in the carriers' rates, and that GPA would have difficulty in ascertaining shipper' names from the carriers who treated such information as confidential. GPA also believes that there would be increased administrative costs and delay to cargo movement if GPA had to bill cargo interests for container-related services rather than bill the vessel interests. (Tr. 614, 746, 799-800, 880-883.) Although complainant agrees that this system is easier for GPA to administer, it also believes that GPA has enough information so that GPA could bill cargo or other parties than vessel interests and that cargo movement would not necessarily be delayed if GPA decided to establish credit relationships with vessels for container charges as it has with forwarders and brokers on breakbulk cargo charges. (Complainant's Reply Brief at 9-10.)

64. When GPA started the system of billing container carriers or their agents for container-related charges, the container carriers accepted responsibility for these charges. (Tr. 615, 803.) The testimony on this point does not identify the specific charges as complainant points out. Moreover, vessel agents have not been happy with this development and were not apparently consulted. (Complainant's Reply Brief at 11.)

65. Container-related services are ordered by the line, its employees or agents. (Tr. 875-876.) However, as noted, if a consignee,

forwarder, or cargo interest wishes to request such a service, the request must be transmitted through the vessel agent. (Tr. 827-828; 534.)

66. Export containers arriving at the Port of Savannah are checked in at the terminal's gate by an ILA (International Longshoremen's Association) clerk, employed by the steamship line or agent or contract stevedore, who prepares a truck interchange receipt (TIR). At this point the carrier takes control of the container. (Tr. 801, 875.) Inbound containers leaving the Port of Savannah's terminal remain under the control of the ocean carrier until they are checked out at the terminal's gate by the ILA clerk. (Tr. 803, 854.) Complainant, however, contends that containers must be broken down between LCL, consignee load, empty, loaded, import, export, and by transportation obligation of the carrier according to bill of lading. Therefore, according to the complainant, the actual control over the container varies between vessel and cargo interest. (Complainant's Reply Brief at 44-45.)

67. GPA believes that its charges for truck arrival and departure cover its maintenance of inventory and control for the line. (Tr. 802-803.) Storage on containerized cargo is considered a vessel charge because the containers are, according to GPA, still under the control of the line until they are interchanged with inland carriers and because the storage charge is assessed against the container and not the cargo. (Tr. 802-803; 497.) Complainant, however, believes that charges for inventory control are not properly assessable against vessel interests, citing a Commission decision,[13] that the TIR clerk only notes the condition of the

[13] The decision is Intercoastal S.S. Freight Association v. Northwest Marine Terminal Association, 4 F.M.B. 387 (1953), discussed later in this decision.

trailer and chassis upon arrival, and that charges on loaded containers after free time has expired are not the responsibility of carriers under their transportation obligations, citing another decision of the Commission.[14] If a consignee refuses to pick up a loaded container, the agents believe that the vessel agent has no control over or contact with the consignee and should not be held responsible. (Complainant's Reply Brief at 45-46.)

G. COMPARATIVE COLLECTION ABILITIES AND EFFICIENCIES

68. There is detailed evidence in the record concerning the relative ability of GPA as compared to vessel agents to recover moneys owed by defaulting vessel operators. Although suing and collecting from vessel operators is not an easy matter for either GPA or agents, a terminal operator like GPA has some advantages over agents in this regard. Agents or GPA can seek to arrest a vessel as claimants under maritime liens if they follow certain procedures around the country and are quick enough to arrest a vessel before she leaves a port of the U.S. Maritime lien claimants are ranked according to certain priorities. A terminal operator would have a claim, after other claims, as a supplier of necessaries. An agent would have a claim and lien to the extent the agent advanced money for payment of supplies and other necessaries for a ship in port but the agent's claim is a subrogated one and he must pay the money to retire the lien debt first. An agent, however, may face special problems in exercising his maritime lien right which a terminal operator does not face. For example, a general, as opposed to a special

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[14] The decision is Kerr Steamship Company, Inc. v. Port of New Orleans, 23 SRR 1294 (1986), discussed elsewhere in this decision.

agent, may not have lien claims, agents may be on notice of prohibition-of-lien clauses in charter parties, an agent's lien accrues only after the agent advances money to retire the underlying debt, and an agent may have trouble tracing his advances to a particular vessel. There may be problems for agents in bankruptcy proceedings if the agent is considered an "insider," in which case trustees seek to recover moneys paid to the "insider" within one year of bankruptcy, and the agent may have no maritime lien. All of the above does not necessarily mean that GPA would have a much easier time than complainant because it was not contended that the complainant was a general agent, and prohibition-of-lien clauses have not always been enforced. (See TTT Stevedores v. M/V Jagat Vijeta, 696 F. 2d 1135 (5th Cir. 1983.) Nor is it clear that agents would always be treated as "insiders." Stevedores and terminal operators as well as agents have had to sue defaulting carriers in foreign countries. For instance, they have sued Hellenic in Greece in a proceeding still underway at the time of the hearing but in which the agents' claims were dismissed. (Tr. 173.) In certain other respects a terminal operator may enjoy an advantage over agents if the terminal operator has greater revenues and resources so that the terminal operator can monitor vessel movements and more easily afford costs of arresting vessels. GPA has far greater capitalization than the typical agency operation, and agency fees cannot compare with GPA's revenues.

69. In terms of which party can more efficiently recover moneys from a defaulting carrier, it would appear that GPA has certain advantages over vessel agents. An agent must pay port charges first before it can arrest a vessel whereas a port can arrest a vessel on the basis of unpaid charges, and a port like GPA has greater financial resources than

a particular agent. However, as the agents concede, the greatest weakness which agents face is that they cannot demand too much of their principals by way of security or cash advances because of the risk that the principal will go to another agent who does not demand security from a principal, i.e., who is willing to assume the risk of a principal's default. (See Complainant's Opening Brief at 58.)[15] The agents, however, believe that a port is in a better position to demand security from vessel operators because the vessel operator "can shop around for agents but he cannot shop around for a port." (Id.) This belief does not reckon with the fact that GPA competes with ports from New York through the Gulf of Mexico. (Tr. 611.) Nor does it consider the fact that many agents are also stevedores and derive considerably more revenue from the stevedoring than from the agency operations. Nor is comparative collection efficiency against defaulting carriers as between agents and GPA necessarily the same thing as terminal efficiencies, i.e., the maintenance of expeditious movement of vessels and cargoes and the reduction of costs of terminal operations. (See WGMA I, 21 F.M.C. at 249, 265.)

70. Vessel agents are not completely free to make demands on their principals regarding security or cash advances because of the competitive situation among agents, and because GPA's tariff requires vessel-agent liability, as a practical matter an agent has to accept such liability if it wants to represent the principal. Because GPA operates the only

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[15] In complainant's own words (Opening Brief at 58):

> The greatest weakness the vessel agents have is that the vessel operators can play agents off against each other. An agent can be only so demanding of security or other advance provision that would justify or help support its collection effort. If an agent is too hard on its principal, the vessel operator can merely switch to other agents.

self-sufficient modern container facility at Savannah and other ports competing with GPA have the same or similar agent-liability provisions in their tariffs, the agents believe that they are victims of economic coercion and that GPA is abusing a monopoly position. (Complainant's Opening Brief at 59-60.) However, GPA believes that the agents' problems in this regard are the result of their own internal competitive situation and the leverage of vessel operators and that GPA does not prohibit agents from obtaining security from their principals or from refusing to assume the risk of non-payment from a vessel principal by refusing to do business with that principal. (See GPA's Reply Brief at 11-12; and WGMA II, 22 F.M.C. at 429, regarding agents' practices in selecting principals prudently.) Furthermore, if GPA were to require vessel principals to "put cash up front," GPA could suffer competitively if Charleston, for example, made no such demands. (Tr. 739.)

71. GPA deems it necessary to its efficient port operations to rely upon a local agent to be responsible for vessel charges for the following reasons. (GPA's Opening Brief, PFF 32):

(a) GPA does not know all the vessel interests that come into the port (Tr. 619);

(b) Its competitor ports follow the same system so that if GPA were to require vessels to advance cash, its competitors would have an advantage in soliciting and keeping vessel customers (Tr. 739-740);

(c) It permits GPA to deal with one local party (Tr. 754);

(d) GPA is not staffed to determine the creditworthiness of all vessel owners and operators (Tr. 754);

(e) All charges may not be determined until after the vessel sails (Tr. 90, 754);

(f) The volume and cost of invoices are reduced and collection made easier (Tr. 755);

(g) Administrative costs can be kept down because additional personnel required to bill other parties are not needed (Tr. 793);

(h) Cargo movements need not be slowed down to check the credit of unknown steamship lines and ensure payment (Tr. 794, 622).

72. Complainant agrees that the above reasons are those that GPA advances in support of its present vessel-agent liability system. However, complainant believes that just because the system makes things easier and quick for GPA does not mean that it is fair, reasonable, and efficient. (Complainant's Reply Brief at 36-39.) More specifically, complainant argues that GPA does have some knowledge of vessel interests coming into the port, that GPA can extend credit to the vessels directly rather than require cash in advance as some ports may do, that GPA is in a better position than the agents to determine the creditworthiness of vessel operators, that GPA can estimate charges fairly accurately and can bill remaining charges instantly by means of its computer system, that simply mailing GPA's bills to vessel operators rather than to local agents could not affect administrative costs and collection, and that cargo movement could also be slowed if agents refused to work vessels while making credit checks and, in any event, "quickness of movement of cargo because the GPA does not check the credit of a steamship line should not be equated with an efficient system." (Complainant's Reply Brief at 39.)

DISCUSSION AND CONCLUSIONS

As mentioned earlier, following the issuance of verdicts and judgments in the two state court proceedings brought by GPA against Harrington and Palmetto, in which these two agents were ordered to pay approximately one-half of outstanding claims against them, two events occurred. Complainant Harrington, which no longer operates at Savannah, withdrew its complaint totally. Complainant Palmetto withdrew portions of its complaint relating to reparations for past actions but wishes to pursue its claims as to the present and future practices at GPA's facilities. Therefore, Palmetto still alleges that GPA's tariff and the practices under it relating to vessel-agent liability and billing of certain terminal charges to vessel agents are unduly prejudicial and disadvantageous and unreasonable and in violation of sections 16 First and 17 of the 1916 Act (46 U.S.C. app. sec. 815, 816) and the corresponding sections of the 1984 Act, sections 10(b)(11); 10(b)(12); and 10(d)(1), respectively, the last provision being extended to marine terminal operators by section 10(d)(3).

The remaining central issue that complainant Palmetto states is now before the Commission is the following (Complainant's Opening Brief at 4):

> Whether all or part of the charges imposed by the Georgia Ports Authority against vessel agents and vessel operators, including but not limited to all container related charges are not properly assessable and collectible from vessel agents or their vessel principals.

In establishing the applicable legal framework under which the facts were to be developed by the parties at the hearing, as I discussed earlier, the Commission affirmed my rulings that previous Commission decisions in the WGMA and related cases held that vessel agents could become personally liable for payment of charges under port terminal tariffs by agreement shown by prior course of conduct, normal business practices, and continuing voluntary use of a port's facilities. The Commission agreed that principles of agency and contract law could be considered to see whether any such agreement would be unlawful because of coercion, duress, unconscionability or because the agreement, contract, understanding, or practice was contrary to public or regulatory policy. The Commission held furthermore that the practice of looking to local agents for payment was reasonable and in furtherance of port efficiencies. However, the Commission also emphasized that the determination of reasonableness and lawfulness of the practice would not be limited by reliance on agency or contract doctrines but by shipping act considerations based upon the fact that vessel agents acted as intermediaries at ports under peculiar relationships in the shipping industry. (See Order Affirming Rulings, cited above, 23 SRR at 1285-1286.) Also, if the facts at Savannah were shown to be the same as those in the previous WGMA and related decisions, those decisions were precedent and were to be followed.

Again, as discussed earlier in this decision, the Commission affirmed rulings in which it was established that vessel agents were not direct physical users of terminal services or facilities comparable to other direct physical users of those services or facilities but were rather indirect users or arrangers of services. Consequently, the reasonableness of the practice of holding vessel agents liable for payment of terminal charges was not to be determined by measuring benefits received by agents compared to the charges paid or by comparing agents' benefits and charges with the benefits and charges received and borne by direct physical users, i.e., the classic Volkswagenwerk test. However, if vessel agents were required to be responsible for charges for which their vessel principals or the agents themselves had no normal duty and no connection, such a practice might be unreasonable absent specific consideration given to the agents for assuming such responsibility. Finally, if GPA's tariff were unclear or ambiguous in certain respects, it was held that the remedy was to conform the tariff language to a practice if the practice itself was reasonable and not to find that the practice itself was unlawful.

As discussed earlier, since the Commission affirmed my rulings on August 4, 1986, the Commission has issued an additional decision confirming the principles of the WGMA and related cases. Thus, in New Orleans Steamship Association v. Plaquemines Port, Harbor & Terminal District, cited above, 23 SRR 1363, the Commission again held that vessel agents are indirect users of terminal facilities and could be held liable for terminal tariff charges absent duress or monopoly abuse and as a result of the agents' course of conduct. (23 SRR at 1374-1376.) Also, on July 23, 1986, the Commission adopted the Initial Decision in Kerr Steamship Co. v. Port of New Orleans, etc., cited above, 23 SRR 1294, in which the vessel agent (Kerr) had settled with respondents and withdrawn its complaint. However, the Initial Decision which was adopted indicated that it would not be a reasonable practice to hold a vessel agent liable for inbound demurrage charges which had accrued after the vessel's legal obligations had terminated. (23 SRR at 1043-1044.)

Contentions of the Parties

Complainant Palmetto argues that the evidence produced at the hearing shows that any agreement that the vessel agents be responsible for GPA's terminal charges, if such exists, is the product of unlawful duress, business coercion, and represents an abuse of GPA's monopoly power. Furthermore, it is contended, the agents have no choice as to whether they can pledge their own credit or require their vessel principals to post security and no choice as to which port their vessel principals call, and are suffering severe financial injury with no viable alternative course of conduct. Moreover, it is argued, the facts at Savannah are substantially different from those prevailing at the Gulf ports in the WGMA cases. Consequently, the reasons for vessel-agent responsibility in Gulf ports do not exist in Savannah, and the vessel agents in Savannah, it is contended, are laboring under an unconscionable agreement which contravenes public or regulatory policy as well as being the product of unlawful duress and business coercion. Finally, Palmetto argues that it is unreasonable for GPA to bill all container-related charges and charges related to cargo interests to vessel interests and to fail to segregate accounts of the agents by their principals. It is also argued that it is unreasonable and unlawful for GPA to hold some vessel agents who order services responsible for payment of charges although there are other vessel agents who are not held responsible.

Respondent argues that complainants were afforded a full opportunity to show why this case is substantially different from the WGMA cases based on respondent's practices but failed to do so. All that complainant has done, argues GPA, is show that a new and difficult economic climate has developed which has created financial and competitive problems for the agents, and now that times are hard the agents want the Commission to relieve them of some of these problems by shifting them to GPA. Vessel agents, it is contended, have long used GPA's facilities with knowledge of the agent-liability provisions and have not shown the existence of unlawful coercion, duress, unconscionability or subjection of agents to liability for exclusively cargo-related charges. Furthermore, GPA has offered many good reasons for its need to rely on the credit of the local agents and for assessing container charges to vessel interests. GPA also disputes complainant's contentions that agents have no options, such as arranging cash advances from their principals, states that they can exercise prudence in rejecting non-creditworthy principals, and states that GPA has procedures to assist agents who request placing principals on a cash basis and does not look to vessel interests to pay cargo charges like inbound demurrage. GPA argues that there would be a number of practical difficulties and additional expenses if GPA were to try to bill container-related charges to cargo interests and that vessel interests control the disposition of containers on GPA's premises and keep the names of cargo owners confidential. GPA also states that it does not enforce its tariff Item 150, providing for application of agents' payments to the oldest invoice regardless of the vessel principal, and is taking steps to delete Item 150 accordingly. (GPA's Reply Brief at 9.)

ASBA, the association of agents, filed a post-hearing brief, arguing legal issues. ASBA at first expresses some concern over the intent of the Commission's order affirming my rulings of law regarding the Commission's reference to consideration of factors beyond principles of contract law and relies upon the fact that the Commission did, after all, expressly affirm the analysis contained in those rulings. ASBA believes that the rulings as to consideration of agency and contract law were "significant rulings favorable to the agents' position" and that it is of "critical importance . . . that contract and agency law be observed," whatever the meaning of the Commission's additional remarks. (ASBA's Brief at 6-7.) ASBA also contends that the Commission apparently misunderstood the purport of the WGMA I decision, in which the Commission had specifically held that a "use equals consent" provision in a tariff had no independent validity (21 F.M.C. at 247), and that such a provision is not evidence of an agreement between agents and ports.

ASBA next argues that there are two possible bases for upholding vessel-agent liability, one, that the agent separately agreed to be bound for its principal's debts, and two, that the agent is a "user" of the terminal. If the latter basis is used, then ASBA believes that the Volkswagenwerk test must be applied and that the test applies even if the "user" is an indirect one or an "arranger."[16] ASBA asks the Commission

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[16] ASBA continued to argue that the Volkswagenwerk test should apply even if agents are "indirect users" or "arrangers" of terminal services although ASBA agrees that one cannot compare benefits received by agents to the benefits received by their carrier principals. (ASBA Brief at 9 and n. 3.) ASBA also asserts that the Volkswagenwerk test is really only a refinement of the reasonableness standard of section 17 of the 1916 Act. (Ibid at 10.) What ASBA does not do is show who is to be compared with agents when measuring benefits received, and that points out why the classic Volkswagenwerk test does not work in this context. A type of Volkswagenwerk test may possibly be useful to determine if agents receive so few benefits that it is unjust or unconscionable to require them to assume the risk that sometimes their principals may not reimburse the agents for moneys which the agents have paid to terminals for terminal services. If so, that analysis can be made under principles of contract law as well as shipping law. Moreover, as I discuss below, even if such an analysis is made as a sort of quasi-Volkswagenwerk test, the facts of record show that agents received considerable overall benefits both from agency fees and stevedoring operations compared to the risk that a principal might some day default, and, indeed, did business for many
(Footnote continued on following page.)

to reconsider the WGMA decisions in the light of different facts developed in this case, especially the superior position of GPA and agents' difficulties in seeking to collect debts and the fact that the Volkswagenwerk decision was not even cited by the complainants in the WGMA cases, and the fact that in the WGMA cases it was shown that the ports compensated the agents for assuming responsibility to pay or collect charges by paying the agents commissions, which GPA does not do.

ASBA, commenting before Harrington withdrew its complaint and Palmetto amended its complaint to remove past issues, contends that the present case looks both to the past and to the future and that, as to the past, the issue concerned not efficiency or legality of agent-liability provisions in a tariff but the question as to who should bear the risk of loss when the agent's principal defaults and the agent cannot collect from its principal despite good-faith efforts to do so, "even if a responsibility to collect absent such bankruptcy or bona fide collection efforts were upheld against the agent." (ASBA Brief at 13.) Thus, argues ASBA, even if agents received some type of consideration to be collection agents for the port, "there can be no consideration for imposing upon agents to insure against bankruptcy of their principals." (ASBA Brief at 14.)

ASBA contends that the facts in this case will show that GPA has monopoly power and may have abused it and that agents trying to do business at Savannah have no free choice and are operating under duress and coercion. Therefore, even if there were an agreement between agents

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[16] (Footnote continued from preceding page.)
years in the apparent belief that it still was economically worthwhile to assume the risk of an occasional defaulting principal.

and GPA, it was not voluntary, and it should not be found reasonable to make agents liable for the debts of their disclosed principals.

ASBA comments on a number of other matters. It wants the matter of vessel-agent liability for cargo charges specifically addressed and disapproved absent specific justification and clear and convincing evidence that agents voluntarily undertook responsibility for such charges for specific consideration, as my rulings discussed. It wants ambiguities in GPA's tariffs clarified in accordance with its earlier pleadings filed on November 1, 1985. It wants the Commission to consider its allegations of unlawful discrimination with respect to imposition of liability on agents and forwarders but not, allegedly, as to shippers and consignees and failure to impose liability on forwarders for vessel charges if cargo charges are assessed against vessel agents.

Finally, ASBA asks the Commission to consider whether, even if agents have somehow consented or agreed to be responsible for terminal charges in the past, such practice should be condoned forever into the future, and argues that the Commission is by law confined to principles of contract and agency law as regards the question of vessel-agents' liability. ASBA argues that the Commission has jurisdiction over terminals but not over vessel agents and therefore cannot "restrict or invade the rights of agents" and "may not alter legal relationships of terminals and vessel agents, to the prejudice of the agents, or find that a terminal's attempt to do so, is 'reasonable.'" (ASBA Brief at 17.)

Hearing Counsel argue that complainant has not shown that the factual situation at Savannah is different from that at the ports in the WGMA decisions and that the vessel agents have for many years been operating under GPA's tariff and have impliedly consented to its terms.

Hearing Counsel cite what they believe to be a number of factual similarities between Savannah and the ports in the WGMA cases, case law establishing that a person using the services and facilities offered by another under a tariff impliedly consents to the terms of the tariff, which establishes the only lawful agreement between the terminal and the user, and contend that complainant, who had the burden of proving that the existing tariff practices are unlawful, has failed to meet that burden. Hearing Counsel therefore conclude that GPA's practices regarding vessel-agent liability are consistent with the Commission's holdings in the WGMA and related decisions, that the agents have, by a course of conduct, agreed to be responsible for GPA's terminal charges, receiving substantial benefit thereby, and disagree with ASBA's contention that the Commission is limited by principles of contract and agency law, citing language of WGMA I (21 F.M.C. at 249), stating that "tenets of state and common law may be evidence of reasonableness and of local business practices" but "they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations." (Hearing Counsel Reply Brief at 2-3.)

Hearing Counsel also argue that there is no record support for complainant's allegations that GPA holds vessel agents responsible for charges which are not properly assessable against vessel interests and argue that complainant Palmetto was aware of its liability under GPA's tariff, that it has done business at Savannah since 1977, that it has protected itself by requiring cash advances from its principals, and that other agents have also been aware of their liability and responsibility under GPA's tariff for many years and have voluntarily continued to do business in Savannah.

Hearing Counsel disagree with the agents' contentions that they are victims of a GPA monopoly and have no choice but to yield to GPA's tariff provision and that they are relatively poor in their agency operations. Instead, Hearing Counsel argue that the record shows that GPA faces competition from other ports and has no monopoly as far as attracting vessels to its port is concerned and that some carriers choose not to hire local, independent agents at Savannah, instead establishing their own agencies at the port. Therefore, it is not GPA that puts agents in a bind but rather economic factors and decisions by carriers whether to call at Savannah in the first place. Furthermore, Hearing Counsel argue, the record shows that the agents are not "poor as church mice," that they earn considerable amounts of revenue per year from their agency operations and far more from their stevedoring businesses, and that they often choose to serve carriers as agents in order to acquire the lucrative stevedoring accounts. Therefore, state Hearing Counsel, "the only duress under which vessel agents operate at the Port of Savannah is self imposed, prompted by the necessity to perform agency functions in order to obtain lucrative stevedore accounts." (Hearing Counsel's Reply Brief at 12), and the duress is "not the fault of the port." (Ibid at 14.)

As to remainder of the agents' contentions regarding discrimination among agents and unreasonable assessments of charges against vessel agents that are properly assessable against cargo interests, Hearing Counsel cite evidence and case law showing, in their opinion, that GPA's practices in charging the agents for certain container-related services and for services falling within carriers' legal obligations or when the containers are still under the control of the carriers or their agents are reasonable and lawful. As to the possibility that GPA might have been assessing charges for storage or demurrage on breakbulk cargo after the vessel carriers' transportation obligations to the cargo had terminated, Hearing Counsel contend that apparently conflicting evidence was resolved by the testimony of GPA's Director of Operations, Mr. Rollison, who testified that GPA does not bill vessel agents for such charges. (Hearing Counsel's Reply Brief at 26-27.) However, Hearing Counsel does argue that the portion of GPA's tariff Item 150 that allows GPA to apply an agent's payment to the oldest outstanding invoice regardless of the vessel principal for whom the agent remitted the payment is unlawful, according to a previous decision of the Commission. (WGMA/Galveston, 22 F.M.C. 101.) Hearing Counsel suggest corrective language to Item 150.

Resolution of the Issues

The Supreme Court made a remark that was quoted by the Commission and by me in my earlier rulings as follows (23 SRR at 782):

> Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation. Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 421 (1959).

The quotation is especially apt in this case because, although the earlier rulings as to applicable principles of law were useful, it was not until the facts came to light that one could determine to what extent the agents had or had not agreed to assume responsibility for payment of GPA's terminal charges, whether they were victims of coercion, duress, or of an unconscionable, monopolistic GPA, whether it was reasonable for GPA to require local agent liability or to bill vessel agents for container-related and other charges, etc. The facts have now been developed in detail. They place this vessel agent-port controversy in a somewhat different light from that which the agents had described prior to the hearing and support the contentions of GPA and Hearing Counsel. Specifically, the facts show that:

1. Vessel agents have been doing business at GPA's facilities in Savannah for many years with full knowledge of GPA's tariff provision requiring them to be responsible for payment of certain terminal charges, have derived considerable benefits from doing business in Savannah, and have done business voluntarily for their own economic reasons, not as a result of unlawful duress, coercion, or unconscionable agreements imposed by a monopolistic GPA, which faces competition itself from a number of ports. The agents' current difficulties stem not primarily from GPA's practices but from problems affecting their own agency industry, namely, competition among agents themselves and the fact that they have little or no say in selecting a port, and a declining economic climate causing their principals to default. To some extent, furthermore, the agents' problems and risks may be alleviated because more and more vessel operators are establishing direct relationships with GPA.

2. GPA is a public, regulated terminal operator with sizeable investments in facilities. It is obliged to serve vessels under reasonable conditions and is entitled to reduce its risks and costs by looking to local agents for payments for services it renders under its tariff, as is the prevailing custom among competing ports, which custom has been found to be lawful and reasonable in previous decisions of the Commission. GPA faces competition from other ports and is not required by law to increase its own costs and risks in order to relieve vessel agents from the agents' own competitive problems by refusing to allow a willing

agent to advance payments for vessel principals, by demanding vessel principals to post security, or the like, when competing ports do not make such demands, and thereby run the risk itself of losing business to competing ports.

3. GPA's billing practices as to containerized cargo services have developed in consideration of the carriers' control over containers while on GPA's premises and the carriers' transportation obligations as well as practices at other ports. Billing vessel agents for such services is not therefore an unreasonable or unlawful practice. GPA states that it does not bill vessel agents or vessel interests for services rendered exclusively to breakbulk cargo, but there is evidence that GPA has sent bills to vessel agents when cargo interests were not on GPA's credit lists and had not paid for such services. GPA should accordingly clarify its tariff to conform to what it says it actually does. GPA does not defend its tariff Item 150, which, in part, allows GPA to apply payments from vessel agents remitted for certain principals to old invoices relating to different principals. Such a tariff provision has been held to be unlawful by the Commission and should be deleted, as GPA states it is in the process of doing.

4. Although complainant has shown that there are different facts in Savannah from those found to exist in the WGMA cases, there are also similar facts and facts which do not support the agents' contentions. Furthermore, although the vessel agents suffer from certain disadvantages caused by problems within their own industry, these problems are not caused by GPA, and the agents are not doing business with GPA under duress, business coercion, or pursuant to unconscionable agreements.

5. Complainant's arguments that GPA is preferring vessel operators and their agents who have leasing agreements with GPA, billing agents for services ordered by other agents, and sending monthly statements to agents without showing the names of vessels are not shown by the evidence and applicable law to constitute violations of law.

My explanations for the above conclusions now follow.

The Agents' Course of Conduct, Method of Doing Business, and Current Problems

As the findings of fact set forth earlier in this decision demonstrate, vessel agents have been doing business in Savannah under tariff Item 140 requiring vessel-agent liability that has been in effect in one form or another since 1963. Although some agents testified that they never really understood that tariff provision to place liability on the agents, the item has been there, and other agents acknowledged that they realized its existence. Indeed, as one former agent conceded, agent liability was recognized as a "necessary evil of doing business." (Tr. 314.) Perhaps some agents believed that Item 140 did not really mean what it said because their vessel principals had over the years usually reimbursed the agents for moneys paid to GPA, and the agents therefore believed that they were only acting as "conduits." However, GPA has enforced Item 140 against vessel agents even prior to filing suit against Palmetto and Harrington in the State Court in 1984, and although there have been occasional misunderstandings, GPA never advised agents that they were not responsible under Item 140. The real reason why Item 140 has not been attacked more vigorously over the years is most probably that vessel principals were reimbursing the agents, and the agents were accordingly not being stuck with the bills. As one agent, Mr. Benton of

SEMCO, a leading agent and stevedore, testified, SEMCO did not make an issue of Item 140 until recently. (Tr. 392.) As GPA has contended, and as the facts indicate, up until the late 1970's and early 1980's, Item 140 has not been a major source of trouble because up to that time vessel principals would either pay GPA directly or place their agents in funds. However, with the advent of the recession in the shipping industry in the late 1970's and thereafter, principals have more and more frequently failed to pay their bills with the result that GPA has turned to the agents for payment under Item 140, and sometimes the agents are not reimbursed. These developments have therefore quite understandably triggered more vehement claims by the agents that the agent-liability provision of GPA's tariff is unreasonable and unlawful, and agents have been seeking means to be relieved of the costs that have occurred when their vessel principals have defaulted. In this regard, furthermore, the agents are asking the Commission to order GPA either to require vessels to post security directly with GPA or help the agents in their efforts to have the vessel principals post security with the agents or with GPA. (Complainant's Reply Brief at 35-36.) However, GPA is obviously reluctant to be the only port to impose such a requirement on vessels when none of its competitors places such demands on vessels. Furthermore, as GPA notes, the agents are trying to shift their problems to GPA, but, as the facts show, an agent has to advance payments for its principal because other agents are willing to do it, and an agent really should exercise prudence when deciding whether to represent a principal whose credit rating may be questionable or face the consequences itself.

The facts show that the agents have peculiar competitive problems within their industry. Thus, as noted, agents are reluctant to demand security from vessel principals because they fear that a principal will simply find another agent who is willing to advance payments to GPA and assume any risk of non-reimbursement. Next, the decision as to which port a vessel will call, as the facts show, is not made by the agents but by the vessel and cargo interests who steer the routing. However, as both GPA and Hearing Counsel argue, agents often willingly accept the agency function for vessel principals in order to obtain the far more lucrative stevedoring business of that vessel. Although sometimes a company may perform as agent and not stevedore for a vessel and vice versa, as Palmetto's own secretary-treasurer and controller, Mr. Roland, testified, "Quite often in order to secure a stevedore account you have to be in the agency business, in order to have the opportunity to get the stevedore." (Tr. 81.) The incentive to get the stevedoring account is quite simply that the revenues derived from stevedoring vastly surpass those derived from agency fees. For example, approximately 90 percent of Palmetto's revenue is derived from its stevedoring operations, from 75 to 80 percent of Harrington's net profits come from stevedoring, and approximately 80 percent of the agent-stevedore Stevens' gross revenues were generated from stevedoring. Furthermore, the size of these revenues is considerable. Palmetto's overall agency revenues currently average \$400,000 a year, and its total agency revenues in 1983 amounted to \$700,000. If, as testified, Palmetto's agency revenues comprised 6.18 percent of total revenues, as Hearing Counsel note, Palmetto's total overall revenues per year currently must approximate \$6.4 million.

The picture that emerges from all of these facts is not that tiny agents are being forced by a massive monopoly, GPA, into unconscionable agreements. Rather it is that sizeable companies, which function as agents and stevedores at a number of ports, have voluntarily assumed the risk that a vessel principal might occasionally default as regards reimbursing the agent for terminal charges, and they have assumed that risk in order to obtain sizeable stevedoring revenues (and not insubstantial annual agency fees either). Furthermore, they had little or no choice in the matter of selecting Savannah as the port, i.e., that decision was not forced on the agents by a monopolistic GPA, and, although they would prefer that the risk of a defaulting principal be shifted to GPA or otherwise alleviated, their own competitors in the agency business are willing to assume that risk and therefore they must also. But, in the last analysis, these agents-stevedores are not charities but businesses who seek profits. If it were not profitable to assume the risk of a defaulting vessel principal with regard to reimbursement for payment of terminal charges and to consider such risk as a necessary evil and cost of doing business for the sake of obtaining lucrative stevedoring accounts, one could quite properly infer that the agents would not have made the decision to keep operating as they have.[17] In other words, there are several reasons why the agents have voluntarily continued to do business in Savannah, notwithstanding tariff Item 140, but the reasons are not that they were coerced by GPA. If they are prevented from demanding that their vessel principals post security with

[17] The standard of proof in administrative cases is, of course, a preponderance of the evidence, that is, that a fact more probably exists than that it does not. Furthermore, there is considerable authority holding that agencies can draw inferences that any reasonable person would draw from the facts as well as inferences based on the agency's particular knowledge and expertise. See discussion and cases cited in Port Authority of New York and New Jersey v. New York Shipping Association, 22 SRR 1329, 1353 (I.D., adopted in pertinent part, 23 SRR 21 (1985)).

the agents or make cash advances before the agents will accept the accounts, that is not because GPA prohibits such protective devices. It is rather that the agents' own competitors in the agency industry do not make such demands on the vessels. Furthermore, despite these competitive pressures from other agents, a large agent such as Strachan has on occasion demanded cash in advance from principals and has turned down the business if its demands were not met, although stating that making such demands on principals "is a tricky business." (Tr. 328.) Other agents have demanded cash advances from principals and have been more successful with single-vessel tramp operations in this regard. However, obtaining advances from principals for various disbursements does not necessarily mean that the agents can require principals to make cash advances on all anticipated port expenses before the agents agree to represent the principal. (See the numerous record citations in GPA's Opening Brief at PFF 52, 53; GPA's Reply Brief at 7; Complainant's Reply Brief at 11-13.) These facts show that agents can protect themselves to some extent against the risk of defaulting principals and that, to the extent they cannot, it is competitive pressure from other agents rather than GPA's tariff that is the primary cause.

Still another fact to consider is that, according to one of the leading agent-stevedores, SEMCO, which operates at a number of South Atlantic ports, today more and more principals are instructing SEMCO to send GPA's invoices to the principals for direct payment by the latter. (Tr. 392-393; 408-409.) This fact, together with the fact that more and more carriers open local offices in Savannah and do their own agency work and deal directly with GPA would indicate that changing events in the shipping industry may be helping to reduce the risks or cash-flow problems that a local agent will have if vessel operators pay GPA directly, and agents do not have to advance funds to GPA.

Accordingly, as was the case in WGMA I, the record supports the finding that vessel agents have, by "their prior course of conduct, normal business practices, and continuing voluntary use of the facility" (21 F.M.C. at 250, quoted by the Commission in its order affirming my rulings, 23 SRR at 1282), conducted themselves under agreements, arrangements, understandings, or contracts by which they promised to pay GPA's terminal charges on behalf of their vessel principals, thus no longer being merely agents of disclosed principals. In return for these promises, the agents received very considerable benefits in the form of revenue earned not merely from agency fees but often from vastly larger stevedoring fee charges, the agency services often being performed in order to acquire the stevedoring. In terms of contract law, the agents had agreements or contracts both with their vessel principals under which they agreed to advance payments for those principals to GPA as part of their agency contracts with the principals and also agreed to pay GPA as part of their understanding with GPA. In terms of shipping law considerations, which the Commission suggested in its order (23 SRR at 1286), the agents act as intermediaries between the port and the vessel principals, and the reliance by the port on the agents for payment is, as it was in the WGMA cases, a reasonable practice. See also Folgner v. Italian Line, 383 F. Supp. 816, 818 (D.C.C.Z. 1974) (party who voluntarily makes use of terminal facilities impliedly consents to the terms of the terminal's tariff.)[18]

[18] The citation of this case does not mean, as ASBA seems to fear, that a "use equals consent" rule in a tariff such as GPA's Item 95-A (Footnote continued on following page.)

GPA's Alleged Abuse of Monopoly Power

In its order affirming my rulings of law, the Commission specifically rejected the agents' arguments that GPA should be found to be a monopoly merely on the basis of findings in a previous case involving an exculpatory or indemnification provision in GPA's tariff that GPA had abused monopoly powers by driving a hard bargain with stevedores. (Order, cited above, 23 SRR at 1284.) The Commission specifically held that the finding in the previous case "cannot, however, be extended to a general finding that GPA is a 'monopoly' in terms of its facilities or abusive in its relationships with those who do business with the Port." (Id.) The question of whether GPA's practices in requiring agents to pay terminal charges, as the Commission remarked, "remains a question to be determined upon the facts to be brought out in further hearings in this case." (Id.) (See also my rulings, cited above, 23 SRR at 776.)

The facts have now been fully developed, and, as seen earlier, they do not support the agents' contentions that GPA has abused monopoly powers. It is true that GPA clearly has the vastly superior container facilities at Savannah and that the private terminal operating there, East Coast Terminals, cannot compare with GPA's container facilities although it appears to handle considerable breakbulk cargo. However, GPA

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[18] (Footnote continued from preceding page.) determines that any particular provision in the tariff is lawful and reasonable or that the user has in fact voluntarily agreed to the terms of the tariff. As my earlier rulings indicated, the Commission has found provisions such as Item 95-A to be harmless and to serve merely to advise users of their responsibilities. As with several other arguments raised before these rulings and the Commission's order affirming them were served, the contentions that Item 95-A and the "Customer Data Sheet" implementing that Item are unlawful seem not to have been pressed after the rulings were issued, and little or no evidence about them was introduced. (See rulings, cited above, 23 SRR at 781-782.)

faces competition from ports from New York through the Gulf of Mexico. (Tr. 611.) Moreover, Charleston, South Carolina and Jacksonville, Florida, offer container facilities comparable to "Container Port," as the Savannah container facilities are known. As Hearing Counsel note (Hearing Counsel Reply Brief at 9-10, and record citations therein), competition among the ports results in continuing solicitation of ocean carriers by all ports, and when solicitation efforts are successful, this often causes the carrier to cease serving a particular port. GPA has had some success in persuading containerized lines to use Savannah as a load center. United States Lines was attracted in this way, as were over a dozen lines in all. (Exhibit 1.) However, that line has now gone into bankruptcy, and, according to press reports, owes GPA, an unsecured creditor, over $1.4 million. (Journal of Commerce, November 26, 1986.) Furthermore GPA has lost carriers to other ports, for example, losing two carriers, who apparently had lease agreement at Savannah, to Charleston. (Tr. 665, 846.)

Because other South Atlantic ports place responsibility to pay terminal charges on vessel agents and do not force vessels to post security, agents cannot simply go to another such port for relief. However, because they do not select the port at which vessel principals call in the first place, they could not select another such port even if that other port relieved them of responsibility. These facts do show that vessel agents suffer from a number of handicaps, but, as noted earlier, many of them are caused by competitive problems within the agency industry.

Even if it is true that agents are locked into Savannah and have little or no bargaining power compared to GPA and other ports in the South Atlantic, this does not mean that GPA has unlawfully abused its superior position by refusing to change its longstanding business practice of relying upon local agents for payment of its terminal charges and by not changing this practice to help bail out the agents from their peculiar competitive problems. The agents want GPA to relieve them of the risk of defaulting principals by requiring the principals to post security directly with GPA or even by having GPA refuse to allow a second agent to pledge its credit for payments to GPA on behalf of a vessel principal if a first agent had deemed the principal to be a credit risk and had refused to give that principal credit. (See Complainant's Reply Brief at 35-36.) If GPA were to do this, as the complainant argues, this would enable the first agent to decide whether to give credit to the vessel principal and if the agent declined to do so, in effect, force that principal to go on a cash basis before its vessels could be handled at Savannah. (Id.) These requests by the agents, or at least by some of them, are understandable because the first agent would no longer have to run the risk of losing the vessel principal to another agent who was willing to give the principal credit. In other words, such new practice would relieve the agents of the competitive pressures they face from other agents. However, GPA would have to stick its neck out among all of the competing South Atlantic ports and risk driving a vessel to Charleston or elsewhere.[19] It is one thing to prohibit a powerful bargainer

[19] Even one of the agents admitted the danger to GPA if GPA were the only port to go to vessel principals and demand cash in advance. Thus, John Benton of SEMCO, a leading agent-stevedore company operating at Savannah and other ports, was asked (Tr. 425):

> Q: . . . suppose the Georgia Ports Authority directly asked for cash or they wouldn't work the ship. What is the competitive problem there?

(Footnote continued on following page.)

like GPA from making innocent stevedores or other users of GPA's facilities indemnify GPA for the negligence of GPA's own employees, an unreasonable and unlawful practice as the Commission found in Southeastern Maritime Company v. GPA, 23 SRR 941 (1986), and numerous other cases.[20] It is quite something else to make a public terminal open to all comers, which seeks to have security that it will be paid by questionable vessel operators frequently located overseas and owned by foreign governments, cease looking to local companies for payment and instead make unique demands on its vessel customers that its strong competitors do not make. Unlike the practice of throwing liability onto innocent stevedores when the port itself has caused the damage through its own negligence, a practice uniformly condemned by the courts and the Commission, the practice of a port's looking to local companies for payment has been found to be reasonable and lawful over and over again in the WGMA and related cases. Furthermore, GPA has invested huge sums into its facilities ($352 million in assets for fiscal 1986). GPA, being a public terminal and subject to regulation, is not completely free to choose which vessels can call and is expected to operate on a sound financial basis. See WGMA I, 21 F.M.C. at 265. GPA is larger and may be able to absorb the additional costs of collection from defaulting vessels overseas and elsewhere and may have advantages over the typical agent in this regard, as the evidence seems to indicate. However, as GPA contends, the

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[19] (Footnote continued from preceding page.)

A. It depends but I would think that the South Carolina Ports Authority would love for them to do that.

[20] See, e.g., Stevens Shipping and Terminal Co. v. South Carolina State Ports Authority, 23 SRR 267, I.D., adopted by the Commission, 23 SRR 684 (1985); and rulings issued in the cited case, 22 SRR 1030 (1984).

Commission is concerned over the efficiency of terminal operations whose primary duty is to facilitate movement of cargo under reasonable terms and conditions, not who is better able to absorb bad debts. In this regard, the Commission has specifically held that "it is essential to good port operations that a well accepted local agent be present to assume financial responsibility for payment of port charges." (WGMA II, 22 F.M.C. at 429.) The record in this case shows that at least six ports in the South Atlantic have tariff provisions placing liability on the vessel agents. (Ex. 15.) The WGMA cases show that such is the prevailing custom among Gulf ports, and in WGMA II, the Commission noted that "this is the common practice throughout the ports of the United States." (WGMA II, cited above, 22 F.M.C. at 429. See also WGMA I, 21 F.M.C. at 270.) In none of these cases has the Commission found sufficient reason to require a public terminal operator like GPA to stop looking to local agents for payment of terminal charges and to rely instead on non-local carriers.[21] Although complainant has shown that the facts at the Gulf ports, as seen from the WGMA cases, are not identical to all the facts at Savannah, there are also factual similarities pointed out by GPA and Hearing Counsel and facts at Savannah which do not favor the agents'

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[21] As I mention later in this decision, in Docket No. 83-48, Alaska Maritime Agencies, Inc. et al. v. Port of Anacortes et al., 22 SRR 1181 (I.D. approving settlement), some 30 or so West Coast ports reached settlement with some 26 vessel agents and agreed under some circumstances and in the ports' discretion to look to vessel principals for payment. This was a voluntary settlement on a regional basis, however, not an admission by the ports of unreasonable practices.

position, which I discuss elsewhere. Accordingly, I find insufficient basis on this record to depart from the WGMA precedents.[22]

GPA's Particular Billing Practices for Container-related and other Services

Complainant Palmetto challenges GPA's specific billing practices as to container-related and breakbulk services as regards who should bear the charge between vessel and cargo interests, how other interests such as forwarders are treated, and how GPA applies agents' payments without regard to the particular vessel principal involved. For the most part, the facts show that GPA bills container-related charges to vessel agents in consideration of the transportation obligation of and control by carriers over containers and cargoes. There is evidence, however, that vessel agents have been billed when cargo interests have not paid or were not on GPA's credit lists, and GPA's tariff is not clear on this matter. Finally, GPA's tariff Item 150, which, in part, permits GPA to apply payments from agents to the oldest unpaid invoices regardless of the principal for whom the agent remitted payment, authorizes an unlawful practice and is unlawful on its face, as the Commission has held in WGMA v. The City of Galveston, 22 F.M.C. 101, 107 (1979), reconsideration denied, 22 F.M.C. 401 (1980). The item must therefore be amended.

[22] Before leaving the matter of the agents' contentions that GPA is a monopoly that has abused its powers and harmed the agents, it is reasonable to infer from evidence of record that it is partly owing to GPA's aggressive sales efforts around the world that the numerous agent-stevedores at Savannah obtain business at the port in the first place. Mr. Rollison, GPA's Director of Operations, testified that as part of GPA's sales efforts, it lauds the local agents serving Savannah and hands out promotional literature that lists local agents. (Tr. 846-851.) In other words, GPA advertises for the local agents as well as its port facilities. He did also testify, however, that the agents help the port in return in the agents' own sales efforts. (Tr. 849.)

The agents' arguments as to GPA's alleged billing practices for specific charges are that GPA unreasonably bills all container-related charges to the agents and that it also bills agents for breakbulk charges if the cargo interest (shipper, consignee, forwarder, customhouse broker) is not on the GPA's credit list. The agents contend that GPA assesses these charges without regard to the transportation obligation of the vessel or to who caused the demurrage in the case of demurrage charges, and that GPA should be required to segregate empty from loaded containers and assess demurrage (storage) charges arising after the end of free time on the party that caused the cargo to go into storage in excess of free time. The agents also contend that because of GPA's practice of requiring all service requests on container-related charges to be funneled though a vessel agent, it cannot be determined which cargo interest ordered the service and who thereby caused the cargo container to go into storage. Hence, GPA ought not to be allowed "to collect for any container storage charge in this case. . . ." (Complainant's Opening Brief at 93.)

The agents also argue that particular charges such as truck arrival and departure, rail arrival and departure weigh on arrival services, and U.S. Customs inspection should not be assessed against vessel agents, that there are no corresponding charges against cargo on breakbulk movements, that these charges are charges that GPA incurs to keep track of cargo, and that these and LCL (less-than-carload) charges are being assessed on vessel agents even after the vessel's transportation obligations have ended. The agents finally contend that if, as GPA contends, GPA does not bill vessel agents for inbound and outbound demurrage (storage) or handling charges on breakbulk cargo despite agents' testimony that they are billed if cargo interests are not on GPA's credit list, GPA ought to be ordered to clarify its tariff and conform it to what it says GPA actually does. (Complainant's Opening Brief at 95-96.)

GPA's practice in billing all container-related charges to vessel interests seems to have begun sometime in 1971 or thereabouts when GPA and members of the South Atlantic Marine Terminal Conference, as I have found previously, decided to bill vessel interests instead of cargo interests. The reason for this decision was the belief that container lines were including container-related services in their rates at other ports, and that if such services were charged to cargo interests, those interests would be paying twice. Moreover, because the lines kept the names of the cargo interests confidential, it was difficult for the ports to ascertain whom to bill. In 1975, furthermore, GPA transferred payment of wharfage charges from cargo to vessel interests. Switching billing from cargo to vessel for wharfage charges has been found to be lawful in several cases, as Hearing Counsel point out. See WGMA I, 21 F.M.C. 244, and Boston Shipping Association v. Port of Boston Marine Terminal Association, 11 F.M.C. 1, 9-10 (1967). The Commission found the transfer of such charges to be reasonable because it furthered the carriers' transportation obligations and, in Boston, because other ports were assessing such charges against vessels and Boston was trying to make its port more competitive by reducing costs against cargo. See Boston Shipping Association, cited above, 11 F.M.C. at 9-10. See also WGMA I, cited above, 21 F.M.C. at 248. In WGMA II, moreover, such charges as dockage, shed and pier use, wharfage and outbound cargo demurrage, were found to be assessable against vessel interests. 22 F.M.C. at 425.

The record shows additional reasons why GPA bills all container-related charges to the vessel agents or vessel interest. Briefly, the record shows that containers are under the control of the vessels or their agents from the time they are checked into GPA's premises until they leave. On containers being shipped outbound through Savannah, the vessels take control of the containers when the containers arrive at GPA's interchange lanes inside Savannah's security gate and the vessel's clerk issues a truck interchange receipt (TIR). (Tr. 574, 801-802, 868, 875.) Obviously the carriers' transportation obligation is invoked at this point, as complainant has conceded. (Complainant's Opening Brief at 94.) Similarly, on inbound containers, after the containers are unloaded from vessels at Savannah, they are deposited at a designated area on the terminal, and the vessel agent notifies the consignee or other cargo interest that the container has arrived. What happens is that a truck comes to GPA's facilities to pick up the container at a parking area, it is taken to the interchange lane manned by an ILA clerk employed by the vessel or its agent, and a TIR report is issued at that time which is forwarded to GPA, which then assesses a truck departure charge against the vessel agent. (Tr. 802-803.) Control over the container thereafter passes from the carrier. (Tr. 854.) Indeed, inbound cargo, whether containerized or breakbulk, cannot be removed from GPA's terminal facilities until the carrier or its agent issues a release. (Tr. 575-576; 797-798.) According to Mr. Rollison, GPA's Director of Operations, containership operators have not objected to the assessment of truck arrival and departure charges or storage charges assessed against them for such movements, stating that "this is their system when container facilities started in Savannah." (Tr. 803.)

As GPA states, the evidence shows that "the vessel interests control the disposition of all containers on GPA premises, from interchange on those arriving by land, and until interchange out on those leaving. In most instances, GPA does not know the identity of the cargo interest, and vessel interests keep the information confidential. While containerized cargo does not analogize well to breakbulk cargo, it does appear that the vessel interests' transportation obligations begin and end with interchange. In consequence, it is entirely reasonable to assess such charges to vessel interests." (GPA's Reply Brief at 30.)

It is well to bear in mind, as Hearing Counsel argue, what the transportation obligation of carriers and vessels is. It is well settled in numerous decisions of the Commission and the courts that terminal operators perform certain services for carriers when carriers do not operate their own terminals as part of the common carriers' duty to receive cargo for export and tender cargo for delivery under reasonable conditions. The Commission summed up the obligations of the carrier to the cargo and the function of the terminal operator in carrying out these obligations in some detail in WGMA I, cited above, 21 F.M.C. at 260-261. As the Commission stated in that decision, "[i]t is well settled that the carrier's responsibility to the cargo does not end when the vessel ties up at the dock." (Id. at 260.) Citing a decision of the Court of Appeals in American President Lines v. Federal Maritime Board, 317 F. 2d 887, 888 (D.C. Cir. 1962), the Commission stated that "the vessel's obligation does not end until it makes a tender of the cargo for delivery to the consignee at the pier" but that consignees are obligated, after a reasonable amount of time has elapsed (known as "free time") to pick up their cargo. (Id.) With regard to outbound cargo a similar duty on the part of the carrier exists, i.e., "[t]he vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship." 21 F.M.C. at 261; see also California v. United States, 320 U.S. 577, 580 (1944); WGMA II, 22 F.M.C. at 439. In giving consignees a reasonable time to pick up inbound cargo and shippers a reasonable opportunity to tender cargo for export, the cases state that the carrier performs those duties through arrangements with the terminal which becomes, in effect, an agent for the carrier. 21 F.M.C. at 261; see also Boston Shipping Association v. Port of Boston Marine Terminal Association, 10 F.M.C. 409, 415 (1967), appeal denied under the name Marine Terminal v. Reder. Transatlantic, 400 U.S. 62 (1970); Investigation of Free Time Practices-Port of San Diego, 9 F.M.C. 525, 539 (1966); WGMA II, cited above, 22 F.M.C. at 447-448; Boston Shipping Association v. Port of Boston Marine Terminal Association, cited above, 11 F.M.C. at 9; Truck Loading and Unloading Rates at New York Harbor, 13 F.M.C. 51, 60-64 (1969); Reefer Express Lines, Pty., Ltd. v. Uiterwyk et al., 23 SRR 885, 896 (I.D., adopted by the Commission, 23 SRR 1518 (1986).

In the present case, as discussed above, the facts show that containers remain under the control of the vessel interest from the time they check into GPA's facilities until the time they are checked out and released by the vessel interest. This is clear in the case of through movements when the containers move under carriers' intermodal tariffs through Savannah from or to an inland point in the United States. However, even when containers are consigned to Savannah under carriers' bills of lading, the practice at Savannah is that the carriers must authorize release of the container. In other words, the container cannot be removed from the terminal until the vessel agent has issued a release. (Tr. 575, 576.) The same appears to be true regarding LCL cargo unloaded at off-dock container freight stations. (Tr. 581.) Therefore, as Hearing Counsel argue, whatever might otherwise have been the normal obligation of the vessel to make containers accessible to consignees and to allow a certain amount of free time for consignees to pick them up before demurrage begins to accrue, the practice at Savannah, by which vessels or their agents retain control over the containers at all times while they are on GPA's premises, appears to be a special circumstance which would make it reasonable for the vessel interests to assume responsibility to pay all charges incurred by the container until it leaves the terminal. (Hearing Counsel's Reply Brief at 24.)[23]

Although the record shows that vessel interests control containers while they are at GPA's facilities and can therefore be reasonably held

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[23] As mentioned, the agents contend that truck arrival and departure and rail arrival and departure should be assessed against cargo, not vessel interests, because the agents claim the charges are for inventory control over cargo. (Complainant's Opening Brief at 93.) The testimony indicates rather that the charges are for services rendered to the vessel and that GPA would incur serious costs, burdens, and delays if it were required to try to identify the numerous owners of cargo laden in containers whenever a container arrived at GPA's facilities. (Tr. 878-883; 802-803.) Complainant cites Intercoastal S.S. Freight Association v. Northwest Marine Terminal Association, 4 F.M.B. 387 (1953), to support its argument. However, in that case the Commission found a peculiar custom relating to receipt of lumber by terminals by which the terminals checked and tallied the lumber shipments for the shipper, not the carrier, which did not check and tally lumber shipments, and that this custom was an exception to the carrier's duty as regards receipt of general cargo for shipment. 4 F.M.B. at 393-394. Therefore, the carrier was not required to pay for the service. In a recent case the Commission has held it to be reasonable to assess warehouse checking charges against a carrier for services which fell within the responsibilities of the carrier and when the carrier exercised some control over the cargo and selected the terminal. See Reefer Express Lines, Pty., Ltd. v. Uiterwyk et al., cited above, 23 SRR 1518. Of course, if the carrier's rates do not already include payment to the carrier for a particular service, the carrier can rebill the cargo interests. Id. at 1523 n. 9.

responsible for container-related services, the situation with respect to breakbulk charges is not so clear. Breakbulk charges were not at issue in the State Court suits, as the parties concede. However, complainant contends that the agents testified consistently that they were being billed for handling charges on breakbulk cargo unless cargo interests were on GPA's credit list, although GPA testified that such charges are billed only to cargo interests. Complainant therefore asks that the dispute be resolved simply by ordering GPA to conform its tariff to what it says is its practice. (Complainant's Opening Brief at 95-96; complainant's Reply Brief at 32; 43-44.) Hearing Counsel contend that there is conflicting evidence in the record as to GPA's billing practices on breakbulk cargo. Hearing Counsel note that the legal obligation of vessels on outbound breakbulk cargo begins with the deposit of such cargo at the place designated on the terminal for assembly of outbound cargo and terminates on inbound cargo when the cargo has been made accessible to the consignee and a reasonable period of time is allowed for the consignee to pick it up. (Hearing Counsel's Reply Brief at 26.) Hearing Counsel state, however, that the confusion in the record was eliminated by the testimony of Mr. Rollison, GPA's Director of Operations, who testified that the cargo interest, not the vessel agent, is billed for handling and storage on import cargo. (Tr. 854-855.)

GPA has stated a number of times that it does not bill vessel agents for exclusively cargo charges and specifies that inbound and outbound handling and storage charges are assessed against cargo interests. (GPA's Reply Brief at 19; Tr. 795-796; 854-855; GPA's Opening Brief, PFF 39-42.) Testimony indicates that instructions to GPA for billing of handling and storage on export cargo are contained in loading orders furnished to GPA by vessel agents and that GPA is instructed whom to bill in these orders. (Tr. 857-859.) Sometimes GPA is instructed to bill the vessel agent and, other times, the shipper or forwarder. (Id.) On import cargo the customhouse broker employed by the consignee to clear the cargo through customs provides a tally to GPA with instructions to ship. When the vessel agent furnishes and stamps a release, all charges for handling and storage are billed to the cargo. (Tr. 797-798; 859.) If cargo is "in bond," i.e., it has been landed at Savannah by mistake or otherwise and is destined for another port, it is considered to be still under the control of the vessel. (Tr. 796, 856.) The vessel applies to U.S. Customs, which allows the vessel to move the cargo under bond to the correct intended port of discharge that the vessel's bill of lading specified. (Tr. 856.) Under these special circumstance, the vessel agents are billed for handling and storage. (Id.)

It appears, according to GPA's testimony, that GPA bills cargo interests on export cargo or vessel agents if so instructed by the loading order furnished by the vessel agent, and that on import cargo, GPA bills cargo interests after the line release provided by the vessel agent is furnished to GPA, except in the "in bond" situations in which the vessel retains control over the cargo and is consequently billed. In all these situations it appears also that the vessel interests maintain control over the cargo and instruct GPA whom to bill. Furthermore, GPA states that it holds customhouse brokers or freight forwarders responsible for cargo charges and has sued them to collect such charges. (Tr. 855.) GPA furthermore testified that it holds cargo interests responsible to pay handling and storage charges on export cargo and handling charges on import cargo and, as for other services, bills the person requesting the services. (Tr. 796-797.) If a person such as a freight forwarder or broker requests special services, GPA, according to its testimony, does not look to the vessel agent or vessel for payment. (Tr. 797.)

As Hearing Counsel state (Hearing Counsel's Reply Brief at 27), there is nothing in the above evidence which would support a finding that GPA's billing practices for services rendered to breakbulk cargo are unreasonable. That might be the end of the matter. However, the agents consistently testified that they have received bills for services rendered to breakbulk cargo if the cargo interest is not on GPA's credit list. (Tr. 217-222; 330-332; 498-499; 533-535.)

One agent witness (Ms. Jenny, Palmetto's agency manager, with the company for five and one-half years) testified that GPA would bill the breakbulk cargo interests on storage and handling charges if these interests were on GPA's credit list and would bill the vessel agent for special services arranged by the agent. (Tr. 217-222.) She also testified that local freight forwarders would almost always have credit with GPA. (Tr. 218.) Presumably, therefore the agent should not often receive a bill from GPA for the breakbulk handling or storage service. (Tr. 218.) However, if the cargo interest did not have credit, she testified that Palmetto would receive the bill from GPA and that this bill would even include storage, i.e., demurrage, charges on cargo that consignees have not picked up. (Tr. 218-219.) However, in order to avoid having to pay such a charge and, as part of the services performed by an agent, she testified that Palmetto maintains contact constantly with cargo interests (forwarders, shippers) advising them to come pick up the cargo. (Tr. 219-220.) If Palmetto received a bill for such breakbulk services from GPA, she also testified, Palmetto tries to collect the money from the party who should be paying it. (Tr. 220.) If Palmetto is unable to collect, she testified that GPA "asks us about payment of the bill." (Id.)

It is difficult to reconcile the conflicting testimony. GPA's Executive Director, Mr. Rollison, categorically testified that GPA does not look back to the vessel agent for payment of handling and storage (demurrage) on import cargo if the cargo interest fails to pay. (Tr. 854-855.) Nevertheless, an agent like Palmetto may have received unpaid bills for storage or handling of breakbulk cargo and may have tried to collect for GPA. The record does show that GPA has sent bills for breakbulk storage and handling to vessel agents under certain circumstances, i.e., if local cargo interests have no credit with GPA, or if the bills are unpaid by the cargo interests. It appears that at least one agent, who maintained contact with the local cargo interests and gave advice as to the need to pick up the cargo, tried to act as a collection agent for GPA. If the bill remains unpaid, the agent testified that GPA "asks us about payment. . . ." It is furthermore not clear how and when any particular storage or handling charge arose, as to which the agents testified they received the bills instead of the cargo interests, that is, were they related to the vessel's remaining legal obligations, were they rendered exclusively for cargo interests, etc. If I am to find that GPA has violated law by billing agents unreasonably with respect to such charges, the complainant has to show this by a preponderance of the evidence. See Port Authority of New York and New Jersey v. New York Shipping Association, cited above, 22 SRR at 1353; WGMA II, cited above, 22 F.M.C. at 428; WGMA I, cited above, 21 F.M.C. at 247; Reefer Express

Lines, Pty., Ltd. v. Uiterwyk et al., cited above 23 SRR at 1524. Furthermore, if I am supposed to determine the reasonableness of billing practices between vessel and cargo interests for a number of terminal services, so that a suitable order establishing reasonable practices can be issued, this record would require far more detailed evidence as to the allocations and benefits among the different users of the particular terminal services. See the discussion and cases cited in Boston Shipping Association v. Port of Boston Marine Terminal Association, cited above, 10 F.M.C. at 414-415; Investigation of Wharfage Charges at Pacific Coast Ports, 8 F.M.C. 653, 657 (1965); Reefer Express Lines, Pty., Ltd. v. Uiterwyk et al., cited above, 23 SRR at 1520-1521.

With the withdrawal of Harrington's complaint and the partial withdrawal of Palmetto's complaint, the emphasis of this case is not on past practices but on the present and future. Whatever GPA may have been doing in the past regarding the sending of bills for certain breakbulk services to vessel agents, I cannot find on this record that it is GPA's present intention to hold vessel agents responsible to pay charges for services rendered exclusively for cargo or for services occurring outside the scope of the vessel's transportation obligations or responsibilities and to hold them responsible without giving the agents any special consideration. Such a practice would be unreasonable. See my rulings, cited earlier, 23 SRR at 764 n. 5; 770 n. 11; 778; Kerr Steamship Co. v. Port of New Orleans, etc., cited above, 23 SRR at 1043-1044; Boston Shipping Association v. Port of Boston Marine Terminal Association, cited above, 10 F.M.C. at 417, 418 (assessment of strike storage (demurrage) charges against vessels after free time had expired on the cargo found unreasonable).

However, because there is evidence that GPA has sent bills for breakbulk services to vessel agents and the agents have testified that they have been regarded as the "last repository" for payment when cargo interests failed to pay these bills, and because GPA's tariff is not clear on this matter, GPA's tariff should be clarified to conform to its stated practice. As I stated in my earlier rulings, cited above, 23 SRR at 780-781, a terminal operator is not prohibited from carrying out reasonable practices merely because its tariff is unclear or ambiguous as to what the operator is in fact doing. However, the operator is required to modify or clarify the tariff to conform to its practices. See also Stevens Shipping and Terminal Company v. South Carolina State Ports Authority, 23 SRR 267, 272 n. 6; 275, adopted, 23 SRR 684 (1985); 22 SRR 1030, 1033-35 (rulings); I. Lucidi v. The Stockton Port District, 22 F.M.C. 19, 29 (1979). As these decisions make clear, the very fact that a tariff provision is unclear or ambiguous and does not conform to actual practice is itself unreasonable, and the Commission accordingly orders clarification. As the Commission stated in WGMA I, cited above, regarding the need for a terminal tariff to specify who is responsible for payment of wharfage charges (21 F.M.C. at 263):

> . . . [I]t is imperative for PHA, or any other terminal facility similarly situated, to have its tariff distinguish, by tariff rule or regulation, with clarity, whether it is the cargo or vessel interest which is liable for wharfage. Otherwise one of the major purposes of the terminal tariff regulations--keeping the Commission and the public informed of terminal practices--could not be satisfied. (Footnote citation omitted.)

Accordingly, if the Commission adopts or otherwise finalizes this decision, GPA shall clarify their tariff to conform to the practices which GPA's Director of Operations states to be the one GPA follows and to show that GPA does not hold vessel agents responsible for payment of charges for services performed exclusively for cargo or for services performed outside the scope of the vessel's responsibilities if the agents have not expressly agreed to be billed for such charges.

A final matter that needs attention is GPA's tariff Item 150, which, in pertinent part, states:

> The Georgia Ports Authority reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agents, or other users of the facilities.

Hearing Counsel correctly state that the above provision has been held to be unlawful by the Commission and suggest corrective language. The agents similarly attack the provision and GPA does not defend it. In fact, GPA states that it does not enforce this particular provision in Item 150 and "is taking steps to delete that portion of Item 150." (GPA's Reply Brief at 9; see also Ex. 14 at 49-51.)

The provision is clearly unlawful according to the Commission decision in WGMA/Galveston, cited above, 22 F.M.C. at 107. Accordingly, GPA shall delete or amend the above provision. An example of language found acceptable to the Commission is shown in the case cited, 22 F.M.C. at 107 n. 11.[24]

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[24] The amendment to a virtually identical tariff provision in Galveston's terminal tariff, which amendment the Commission found acceptable, was the addition of the following language: "except that payment made on behalf of specific vessels and/or owners will be applied, as specified by the payor."

Should the WGMA Precedent be Followed in this Case?

In my rulings affirmed by the Commission, I stated that I would follow the precedent established in the WGMA and related cases unless the facts at GPA's terminals were shown to be so different that the precedential value of those cases was significantly diminished or, unlike WGMA, there was evidence of coercion, duress, or unconscionability in Savannah and no evidence that GPA's practices promoted port efficiencies. See rulings, cited above, 23 SRR at 777, 783.

The parties have argued at some length in their briefs as to the facts existing at Houston or Gulf ports in the WGMA cases compared to the facts in Savannah. Complainant argues that there are numerous factual differences whereas GPA and Hearing Counsel argue to the contrary, and there are profuse references to the cases and the record. I find that there are differences and similarities between the situations at Gulf ports and at Savannah and that there are facts peculiar to GPA's terminals. However, on balance, I find insufficient reason to depart from the WGMA precedent.

Complainant sets forth a series of claimed factual differences in its brief and lists them in chart form. (Complainant's Opening Brief at 64-69.) A number of them have already been discussed and found not to be persuasive, for example, the impact of the risk to the agents in Savannah of assuming responsibility for terminal charges, the fact that agents in Savannah are prevented from demanding security from their principals and that they have no alternative port facilities, the fact that GPA has greater resources in pursuing defaulting vessels around the country or the world and could ascertain vessel owners or establish direct credit relationships with them, the supposed abuse of GPA's monopoly powers, the claimed inability of agents at Savannah to absorb the costs of unpaid terminal bills, etc. However, as GPA and Hearing Counsel have countered, to a large extent, the problems which the agents at Savannah face are caused by competition within their own agency industry, agents have been willing to assume the risk of an occasionally defaulting principal often in order to acquire the lucrative stevedoring business, and agents at Savannah have for years operated under GPA's tariff provision placing liability on them without great objection until recent years when their vessel principals have been defaulting. Furthermore, although GPA has the resources to contact vessel principals directly and could theoretically establish credit relationships with them directly, thus bypassing the agents, the ports competing with GPA do not follow such a practice, and GPA would be sticking its neck out and risking loss of business to such ports if it demanded security from vessels directly. GPA would be undertaking such a business risk, furthermore, not because such practice would directly promote movement of cargo through its facilities but because vessel agents were unable to protect themselves against competitive pressures within the agency industry itself. Similarly, although GPA could conceivably change its billing practices so as to bill cargo interests for container-related services, the evidence shows, among other things, that such a change would be costly, that vessels and their agents keep the identities of cargo interests confidential, and that other ports do not follow such a practice. Therefore, such a change in practice might adversely affect GPA's competitive position vis a vis other ports which do not follow such a practice. As to the agents' inability to absorb the risk of non-reimbursement by defaulting vessel principals, the record shows that a default such as in the case of Palmetto's principal, Hellenic Lines, had a serious financial impact on Palmetto, wiping out Palmetto's profits in 1983 and requiring Palmetto to borrow $500,000 in working capital. (Tr. 81-82.) However, the record also shows that Palmetto and other agents also do business as stevedores and that the far more lucrative stevedoring business helps sustain the agency operations. In Palmetto's case, the stevedoring admittedly kept the agency end of the business alive. (Tr. 82.) However, Palmetto appears to have run a far greater risk with respect to its stevedoring operations than its agency. Thus, Palmetto extended credit to the defaulting Hellenic in the amount of $721,000, of which only 23 percent consisted of port charges at Charleston and Savannah. (Tr. 82.) This fact is offset to some extent by the fact that the port charges which agents pay in advance for their principals far outdistance the agency fees received. Nevertheless, when one considers the total context of an agent-stevedore business like Palmetto's, it appears that the greater risk with respect to defaulting principals is run in connection with the stevedoring business than with payment of port charges and that these risks are costs of doing both agency and stevedoring work for foreign vessel principals.

The default of Hellenic shows that agent-stevedores have for years operated at some risk of default of their vessel principals, which risk, until recent years, has not been significant. In other words, for years the agents have apparently not worried too much about the vessel-agent responsibility provision in GPA's tariff and have accepted it as a "necessary evil of doing business," as one agent-stevedore called it, and have not apparently taken special steps to insure themselves against that risk. Now, however, that vessel principals have been defaulting more frequently, they are understandably seeking ways to be relieved of the risk and suggest that GPA get them off the hook by having GPA deal directly with the principals or by helping the agents obtain security from the vessel principals by ordering GPA to refuse to rely upon the credit of the local agent. (Complainant's Reply Brief at 35-36.) Although such a request is understandable and reasonable from an agent's point of view, it does not mean that unless GPA accedes to the request and changes its present practice, GPA has violated law.[25]

GPA's and Hearing Counsel's responses to complainant's contentions that the facts at Savannah are different from those in the Gulf illustrate why there is insufficient reason to depart from the precedent established in the WGMA and related cases. Hearing Counsel cite a number of significant facts, for example, that it is a common practice among ports in the United States to place responsibility for payment of certain terminal charges on local vessel agents, that agents at Gulf ports as well as at Savannah have used the ports' facilities, being fully aware of the agent-liability provisions in the tariffs, that the port of Houston,

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[25] Because Harrington and Palmetto withdrew or modified their complaints, the emphasis of this case is not on past conduct but on the present and future. I have an insufficient basis to find that GPA violated law by refusing to accede to Palmetto's request that GPA refuse to allow any agent to extend credit to a questionable foreign principal or otherwise force such a principal to post security. However, this does not mean that the present system is the best and can not be improved. The record shows that Palmetto made significant collection efforts against Hellenic by participating in vessel arrest in various locations in the United States and abroad and remitted sums collected to GPA with limited help from GPA. (Tr. 49-61; 81-85; Ex. 3.) Because GPA cannot be compelled in law, alone among its competing ports, to place vessels on a cash basis at the behest of an agent does not mean that GPA cannot cooperate with an agent and in some circumstances help the agent's collection efforts or help the agent obtain security without GPA's boycotting agents who are willing to extend credit to questionable vessel principals. It cannot be in the GPA's best interests to have local agents undergo serious financial risks. Perhaps something like a regional solution as in the Anacortes case, discussed later, could be attempted.

as well as GPA, deals only with local agents unless a steamship line maintains a local office and acts as its own agent, that Houston and GPA would be required to initiate lawsuits around the world unless they could look to local agents for security, that neither Houston nor GPA knows all the vessel principals as regards tramps, etc. (Hearing Counsel's Opening Brief at 13-17.)

Indeed, as the record and previous Commission decisions show, it is a common practice for ports to hold local vessel agents responsible to pay the ports' terminal charges. The practice is common at South Atlantic ports as seen from the tariffs. (Ex. 15.) In both WGMA I and WGMA II, the Commission made findings that the practice was widespread throughout United States ports. See WGMA II, cited above, 22 F.M.C. at 429 ("This is a common practice throughout the ports of the United States."); Id. at 433 ("It is a common practice at ports in the United States . . ."); WGMA I, cited above, 21 F.M.C. at 270. In the portion of WGMA I cited, the Commission remarked that "in all probability the practice has been dictated by the same considerations shown here, that is: the carrier is the user of the facility pursuant to its transportation obligation and port efficiency is promoted by having the agent agree to be responsible for payment of the vessel's charges for the use of the facility." As GPA states, furthermore, the Commission has endorsed the principle that it is efficient for a port to look to local agents for payment. See WGMA I, 21 F.M.C. at 265, 270; WGMA II, 22 F.M.C. at 429. The fact that GPA could change this practice and seek to establish direct credit relationships with overseas vessel principals is not without additional cost and risk of loss of business to other ports.[26] Furthermore, the fact that, as between agents and GPA, GPA may have greater resources to maintain lawsuits, arrest vessels, etc., does not mean that it would be a wise business practice for GPA to do these things and cease relying on the credit of the local agent. Nor, if the agents are unwilling or unable for their own reasons to change their own practice by which they advance payments for vessel principals, can it be found that GPA's practice of looking to the agents for payment is unreasonable and unlawful. The above discussion does not mean that the present system is the only one which would be reasonable or that it would be unreasonable for GPA or any port to help the agents reduce the risks of defaulting principals. However, it does mean that there is insufficient basis in this record to compel GPA to assume the entire risk of a defaulting vessel principal which has retained a local agent or to compel GPA to relieve agents of problems caused by the agents' own competitors.[27]

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[26] See Finding of Fact, paragraph 71, above, and the record references therein, for a convenient summary of the reasons why GPA deems it necessary to efficient port operations to rely upon local agents for payment of terminal charges.

[27] In Docket No. 83-48, Alaska Maritime Agencies, Inc. et al. v. Port of Anacortes et al., 22 SRR 1181 (I.D. approving settlement; F.M.C. notice of finality, October 15, 1984), some 30 or so ports and terminals reached settlement with some 26 agents. ASBA has cited this case and argued that it shows that ports need not hold agents liable under their tariffs. See rulings, cited above, 23 SRR at 783. Settlements are not normally taken as evidence on the merits of a controversy. See Federal Rules of Evidence 408, 28 U.S.C.A. In the Anacortes settlement, the ports did not abandon their right to demand cash in advance from their customers. However, they agreed that a port might waive this demand in its sole discretion on a case-by-case basis if a port determined that a principal was creditworthy. Otherwise the port could demand cash in advance or hold the agent liable. See Docket No. 83-48, Tentative Settlement Agreement, May 21, 1984; and Port of Anacortes Tariff W.D.T. No. 9, 1st rev. page 7a and original page 7 C. Whatever the change from (Footnote continued on following page.)

Finally, complainant points out a fact at Gulf ports that is not the fact in Savannah, namely, that Houston and New Orleans paid vessel owners and agents 4 percent and 3 percent commissions, respectively, to collect wharfage charges which the ports formerly collected from cargo interests. WGMA I, 21 F.M.C. at 256, 258. Complainant argues that those commissions were found to be compensatory to the agents but that, in Savannah, agents receive no such commissions and suffer heavy financial burdens on account of their responsibility to pay charges under GPA's tariff. (Complainant's Opening Brief at 64, 66-67.) These commissions were apparently instituted at Gulf ports to compensate agents and vessel owners when the ports switched from billing cargo interests to billing vessel interests for wharfage and the owners and agents incurred extra costs to act as the ports' collection agents. (21 F.M.C. at 258.)

The practice of paying owners and agents commissions whenever there is a changeover in billing from cargo to vessel interests does not seem to be universal, however. For example, in Boston Shipping Association v. Port of Boston Marine Terminal Association, cited above, 11 F.M.C. at 8-11, the Commission found it reasonable for a terminal operator to shift wharfage charges from cargo interests to vessel interests, finding the charge to relate to services falling within the vessel's transportation obligations. The Commission found, furthermore, that wharfage charges were also assessed against vessels at competing ports in New York, Philadelphia, and Baltimore (11 F.M.C. at 9), but there is no statement

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[27] (Footnote continued from preceding page.)
previous port practice resulted from this settlement, it was done on a regional basis, i.e., no one port was forced to change its practice while its competitors were free to adhere to the old practice. There were also no factual findings in that case and no way therefore to compare the agents' situation there with the agents' situation at Savannah.

that the ports paid vessels or their agents commissions. Indeed, even in WGMA, the agents argued that they should not be held responsible for these charges despite receiving commissions which they described as a "pittance." (21 F.M.C. at 269.)

The reason why the Commission found it reasonable in WGMA I for the port to hold agents liable for vessel-related charges like wharfage was not that the port paid the agents a 4-percent commission to defray agents' administrative costs. It was that the agents, by their own conduct, business practices, and continuing and voluntary use of the port's facilities, had separately agreed to be liable. WGMA I, 21 F.M.C. at 250, 266-267; see also WGMA II, 22 F.M.C. at 429-430. Furthermore, the Commission also upheld the propriety of holding vessel interests liable for vessel-related charges, i.e., charges for services occurring within the scope of the carrier's legal obligations. WGMA I, 21 F.M.C. at 259-261. It is therefore not unreasonable for vessel interests or agents, when the agents have similarly voluntarily made use of GPA's facilities under GPA's tariff provisions over a number of years, to be held responsible for charges related to services rendered in furtherance of their principals' legal obligations. Moreover, the commissions were paid by the ports merely to compensate the owners or agents for extra bookkeeping costs incurred by the owners and agents who now had to act as collection agents for the ports, funneling money received from cargo interests to the ports. (21 F.M.C. at 258.) There is no indication that the commissions were designed to insure agents against the risk of defaulting vessel principals. On the contrary, as the Commission specifically remarked in WGMA I, the agents protected themselves against losses "by utilizing good business practices." 21 F.M.C. at 249. Furthermore, as the Commission noted in WGMA II, one way in which agents could protect themselves against the risk of a defaulting principal, was "merely by determining creditworthiness of the vessel interest. . . ." 22 F M.C. at 431. As the Commission also found, agents in the Gulf ports acted prudently and selectively before deciding to represent vessel principals and considered the vessel's creditworthiness before taking on the representation. 22 F.M.C. at 429. This did not mean that agents never suffered losses on account of defaulting principals. Some of them did. 22 F.M.C. at 431 n. 38. However, that fact was not enough to render the vessel-agent liability system in the Gulf unreasonable and unlawful.[28]

Accordingly, I conclude that although there are differences between the facts existing at the Gulf ports in the WGMA cases and those existing in Savannah, there are also similar facts and, in addition, certain facts which are not favorable to the Savannah agents' arguments. I conclude therefore that there is insufficient basis to depart from the precedent established in the WGMA and related cases. I recognize that the economic climate has changed since the WGMA cases and that agents in Savannah run a greater risk that vessel principals may default leaving the agents (and stevedores for that matter) holding the bag. However, I cannot conclude that GPA is a violator of the shipping laws because it continues to rely

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[28] It is true that the actual losses suffered by some agents in the Gulf in the early 1970's were $16,000 for one agent (on five defaults) and $3,500 for another in 1975. 22 F.M.C. at 431 n. 38. In this case, because of defaulting principals, Palmetto was ordered to pay over $31,000 to GPA, and Harrington was ordered to pay over $54,000 to GPA as a result of the state court judgments. Even allowing for inflation, the latter liabilities substantially exceed the $16,000 figure. However, the record in this case also shows sizeable revenues earned by Palmetto as a result of its agency and lucrative stevedoring operations which motivate agents to perform the agency operations even if agency operations alone are not profitable.

upon the credit of local agents in Savannah who, for competitive and other business reasons, continue to give credit to vessel principals and to advance payments to GPA for vessel-related terminal services on behalf of vessel principals. In other words, I cannot agree with complainant that GPA, alone among its competing ports, must be ordered to refuse to rely on the credit of a local agent who appears willing to represent a vessel principal and to pay GPA's bills for that principal merely because another agent did not want to run the risk of representing that vessel principal.[29] As GPA has noted, if all the agents refused to advance payments to GPA on behalf of a risky vessel principal, eventually that vessel would have to go on a cash basis with any agent and no agent would have to run a risk. (GPA's Reply Brief at 12.) However, because of competition among agents and economic leverage exerted by vessel owners, the vessel owner can presently get an agent to represent the vessel and the agent is consequently at risk. (Id.)

[29] Complainant specifies that the relief it wants is an order against GPA which would require GPA to refuse to rely on any agent's credit if any other agent believed a vessel principal to be a bad credit risk and had refused to represent that principal. (See Complainant's Reply Brief at 34-36.) In other words, if GPA were ordered to do this, vessel principals could no longer shop around for an agent who was willing to give the principal credit and assume the risk of non-reimbursement, and the first agent could, in effect, demand cash or other security in advance. Curiously, complainant's request for such an order would appear to conflict with ASBA's argument that the Commission has no jurisdiction over vessel agents and "may not restrict or invade the rights of agents. . . ." (ASBA Brief at 17.) But such an order would restrict the right of any agent to advance payments to GPA on behalf of a vessel principal and thereby remove any competitive advantage which such agent might have over another agent who was not willing to do this for the principal.

Alleged Coercion, Duress, Unconscionability, etc.

Complainant argues at some length finally that the present case is distinguishable from the WGMA cases because in the present case there is evidence of unlawful duress, business coercion, unconscionability, and abuse of GPA's monopoly power. (Complainant's Opening Brief at 81-90.) Complainant argues that GPA has monopoly power and such an advantage in bargaining power over the agents that any agreement between GPA and the agents would be unconscionable, and the agents had no meaningful choice. (Complainant's Opening Brief at 84.) Complainant contends that agents have no choice in selecting Savannah and "no viable alternative course of conduct to protect [themselves] from liability." (*Id.* at 85.) Complainant cites evidence of what it argues to be evidence of GPA's abuse of power, namely, the fact that in 1975 GPA switched billing wharfage from cargo to vessel interests and billed all container-related charges to vessel agents, that GPA refuses to go to vessel principals directly and require them to post surety bonds or cash in advance, and that GPA holds agents liable for charges even when the line has a leasing arrangement with GPA and a local agent of its own. (*Id.* at 85-90.)

GPA counters these arguments, arguing that it does not have a monopoly of cargo moving through Savannah (only 53 percent of cargo moving through Savannah in 1984 moving through GPA's facilities), that GPA has merely adopted a means to minimize its losses, which means has been approved by the Commission and the courts, that the mere unilateral change in a tariff provision deemed onerous by tariff users is not enough to constitute unlawful duress or coercion, that the Commission has approved a switch in billing wharfage from cargo to vessel interests, that billing vessel interests for container-related charges is reasonable because the services fall within the vessel's control and responsibility, that there is no evidence that GPA tried to collect from an agent who did not order a service or deal with GPA, and that what the agents are really seeking is to be insulated from the risks of the marketplace. (GPA's Reply Brief at 24-29.)

Hearing Counsel also disagree with complainant. Hearing Counsel contend that vessel agents have, by their course of conduct, agreed to accept responsibility for payment of terminal charges incurred by their principals, deriving substantial benefits thereby, and have done so willingly and with knowledge of the tariff provisions. Hearing Counsel argue also that no port has a monopoly, that the agents are not "as poor as church mice," that they have means to protect themselves from the risk of defaulting principals although they are reluctant to use such means, that if the agents are under any duress, it is self-imposed because they need to perform agency services in order to obtain the lucrative stevedoring business, and that GPA does not force any agent to act as agent for a carrier. (Hearing Counsel's Reply Brief at 4-15.)

I find no merit to these various contentions of complainant, many of which have already been discussed. As discussed, the agents have voluntarily done business under GPA's tariff Item 140 for many years, accepting it as a necessary cost of doing business, often in order to obtain the stevedoring business. Furthermore, they have demanded cash advances in the past to protect themselves, but their main problem is that other agents are willing to give vessel principals credit, in other words, there is a competitive problem among the agents themselves. Furthermore, GPA itself faces competition from other ports and follows a practice of looking to local agents for payments, which practice has long been sanctioned by the Commission and is in force among all of GPA's competing ports. What the agents are asking apparently is that GPA stick its neck out and change its practice to extricate the agents from problems the agents cannot resolve among themselves by refusing to allow any agent to pledge its own credit for a vessel principal deemed non-creditworthy by an earlier agent, thereby removing from some agents a competitive advantage, or otherwise forcing vessel principals to post security in advance.

What is new in these contentions is the argument that the agents are operating under unlawful duress, business coercion, or unconscionable agreements, and that some agents are being held responsible for charges unrelated to them. The short answer to these arguments is that the above facts do not rise to the level of unlawful duress, coercion, etc., and that there is no persuasive evidence that GPA is compelling an agent who does not deal with GPA or order a service to be responsible for a particular charge against the agent's will.

In my rulings affirmed by the Commission, I referred to the principles of law that hold that contracts may be voided or unenforced by the courts if they are unconscionable or are the product of duress or coercion. See rulings, cited above, 23 SRR at 776, 777 n. 16. As the authorities cited in the rulings indicate, however, a complaining party must show more than merely a bad or unwise bargain in which the promisor receives little consideration and must show more than merely unequal bargaining positions or disadvantageous economic circumstances to show that an agreement is unlawful and unenforceable. The record in this case shows that the agents have some limited means to protect themselves by asking for cash advances from their principals but, more importantly, they choose to perform agency services for the sake of the stevedoring business and because of competitive pressures from other agents.[30] These problems relate, however, to the agents' business, not GPA's tariff. Therefore, there is not that type of absence of choice or gross disparity in bargaining power between a weak or illiterate party on one side and a huge corporation on the other or the like, which characterize unconscionable, unenforceable contracts. See, e.g., Williams v. Walker-Thomas Furniture Company, 350 F. 2d 445 (D.C. Cir. 1965), and the other cases cited in my rulings, cited above. See also discussion in 14 Williston on Contracts (3d Ed.) sec. 1632B at 71-73. Furthermore, before finding a contract to be unconscionable, courts look to the commercial circumstances surrounding the contract at the time the contract was made, the needs and practices of the particular business involved, do not require that the parties have equal bargaining power, and do not invalidate contracts merely because risks are allocated to the party having the weaker bargaining position. See discussion and cases cited in Phillips Machinery Co. v. LeBlond, Inc., 494 F. Supp. 318, 322-324 (N.D. Okla. 1980). See also Malone v. Crown Cent. Petroleum Corp., 474 F. Supp. 306 (D. Md. 1979) (dealer was no novice and accepted take-it-or-leave-it contract without coercion or undue pressure); Geldermann & Co. Inc. v. Lane Processing, Inc., 527 F. 2d 571, 575-576 (8th Cir. 1975) (contract not found unenforceable merely because aggrieved party believed that contract subsequently proved to be unfair or less beneficial than

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[30] Of course, if an agent believes that a foreign or domestic vessel operator is a serious credit risk, the agent need not agree to become the agent for that operator. GPA looks for a local entity to be responsible for its tariff charges. However, GPA does not force an agent to agree to represent any particular principal. As GPA has argued, if every agent refused to do business with a risky vessel operator unless that operator posted security with the agent, such an operator might be forced to post security.

anticipated); Gordon v. Crown Central Petroleum Corp., 423 F. Supp. 58 (N.D. Ga. 1976), affirmed, 564 F. 2d 413 (5th Cir. 1977) (contract accorded with business practices in the community and dealer did not show that he had failed to understand the provisions of the agreement).

Similarly, the principles of duress and coercion which courts apply to invalidate contracts are not satisfied by the facts shown on this record any more than they were in the WGMA cases. See my rulings, cited above, 23 SRR at 777 n. 16; WGMA I, 21 F.M.C. at 250. Unlawful business coercion, a form of duress, can be shown by the threat of serious financial injury, no viable alternative business course of conduct, and a lack of resort to the courts. See WGMA I, 21 F.M.C. at 250 n. 17. However, courts also expect a complainant party to show that the duress is caused by the wrongful acts or conduct of the other party to the contract and is not merely due to the complaining party's financial or economic embarrassment, threatened financial loss, or business circumstances or to the fact that the complainant party merely entered into a hard bargain. See, e.g., Chouinard v. Chouinard, 568 F. 2d 430, 433-435 (5th Cir. 1978); Johnson, Drake & Piper, Inc. v. U.S., 531 F. 2d 1037, 1042-1043 (Ct. Cl. 1976); Ryder Truck Lines, Inc. v. Goren Equipment Co., Inc., 576 F. Supp. 1348, 1355 (D.C. Ga. 1983); 25 Am Jur 2d, Duress and Undue Influence, secs. 6, 7; 13 Williston on Contracts (3d Ed.) sec. 1602 at 651-665; secs. 1617, 1618, 1618A. The language of the courts is particularly enlightening. Thus, in Chouinard v. Chouinard, cited above, 568 F. 2d at 434, the court stated:

> However, a duress claim of this nature must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim. Thus, the mere fact that a person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic

> necessity is not sufficient. Unless wrongful or unlawful pressure is applied, there is no business compulsion or economic duress, and such a claim cannot be predicated on a demand which is lawful or on the insistence of a legal right. . . . While there is ample evidence of economic necessity and financial peril, neither the "threat of considerable financial loss" nor "impending bankruptcy" establish economic duress. Such economic stress must be attributable to the party against whom duress is alleged. "Mere hard bargaining positions, if lawful, and the press of financial circumstances, not caused by the [party against whom the contract is sought to be voided], will not be deemed duress." (Footnote and case citations omitted.)

In Ryder Truck Lines, Inc. v. Goren Equipment Co., cited above 576 F. Supp. at 1355, the court stated that "economic pressure is insufficient to constitute duress in the legal sense," and quoted from a decision of the Supreme Court of Georgia as follows:

> [O]ne may not void a contract on the grounds of duress merely because he entered into it with reluctance, the contract is very disadvantageous to him, the bargaining power of the parties was unequal or there was some unfairness in the negotiations preceding the agreement."

This record shows, among other things, that GPA's tariff provision requiring local agents to be responsible for the port's terminal charges is a practice which has received the approval of the Commission as a lawful and efficient means for a port to minimize its losses. It cannot therefore be found that GPA has coerced the agents into an unconscionable bargain by making use of an unlawful device, and, as discussed above, the main problems affecting the agents relate to competition among themselves and to their own industry, not to GPA's tariff. I cannot therefore conclude that vessel agents are the victims of unlawful business coercion or duress caused by GPA or that GPA's tariff Item 140 is unconscionable.

Miscellaneous Contentions

The main issues in this case are those relating to the question of the propriety of vessel-agent liability, GPA's practices of holding agents liable for all container-related charges, and its alleged practice of resorting to the agents for payment of breakbulk charges if cargo interests do not pay. There is also the issue concerning the question of GPA's tariff Item 150 authorizing GPA to apply agents' payments to the oldest invoice regardless of the vessel principal, which issue has already been discussed. However, complainant raises a number of subsidiary issues in addition to the above. (Complainant's Opening Brief at 88; 96-99.)

First, complainant contends that GPA is holding agents responsible for charges even though the carrier involved operates under a lease agreement with GPA, to which the agent is not a party, and even though the agent's contract with the vessel principal prohibits the agent from paying the vessel's bills. (Complainant's Opening Brief at 88; Reply Brief at 28.) Also, it is alleged that if a vessel operator employs two agents, e.g., a local in-house agent, and a local independent agent, GPA attempts to collect its charges from the most convenient agent, and that GPA could bill an agent who did not even order the service, which service had been ordered by the in-house agent.

Next complainant alleges that agents employed by vessel operators not having leasing agreement with GPA and not opening local offices in Savannah suffer undue or unreasonable prejudice and disadvantage compared to the in-house agents who are employed by lessee-vessel operators, which agents are not billed, and that the agents employed by non-lessee vessel operators may be billed for berthing charges although they are not normally connected with such charges. Also, lessee-vessel operators may have some type of advantage over non-lessee vessel operators, although this contention is not clear.

Finally, complainant alleges that GPA is acting unreasonably and unlawfully because, although it sends names of vessels to agents on its invoices and backup materials, GPA does not repeat the names of the vessels or lines on its monthly statements of outstanding charges sent to the agents.

I cannot find from the evidence or applicable law that GPA has violated law with respect to any of the above practices or that corrective orders must be issued.

As to the first issue, the record shows that more and more carriers are operating under leases with GPA and that the largest users of GPA's facilities moving well over half the containerized cargo through Savannah operate in this manner and do not employ local independent agents, preferring to use in-house agents or otherwise deal directly with GPA, bypassing local independent agents. As mentioned earlier, this fact suggests that the local independent agents' cash-flow problems may be diminishing because fewer vessel principals may be demanding that the agents advance payments to GPA on behalf of the principals. However, complainant alleges that sometimes a vessel employs a husbanding agent to perform services for the ship as well as having its own agent under a lease but that GPA could hold the agent ordering a berth or ordering other husbanding services responsible for charges for services rendered to containers, which should be the responsibility of the agent or vessel operating under the lease. (See Complainant's Reply Brief at 28.) Complainant seems to be claiming that some agents are held responsible for GPA's charges when they order berthing or other husbanding services while other agents operating for carriers under lease agreements are not held responsible. (Complainant's Opening Brief at 98.)

The record shows, as complainant concedes (Complainant's Reply Brief at 28), that currently husbandry agents do not get bills for services rendered to carriers under lease agreements. However, complainant argues that a situation "could arise," as a Palmetto witness testified, in which GPA would bill a husbandry agent for services rendered to containers under a lease agreement. (Id.)

The record also shows that it is GPA's practice to bill the agent or person who orders the particular service or the party that such person instructs GPA to bill. If a vessel operator chooses to employ two agents, as GPA remarks, that is not the fault of GPA, but is a matter decided by the vessel principal and the two agents concerned. (GPA's Reply Brief at 27, 32.) As GPA further states, there is no evidence that GPA has ever tried to collect from an agent who did not deal with GPA or that GPA appoints the agent who orders the service. (GPA's Reply Brief at 27.) GPA would not object to holding both agents responsible if they advised GPA that they would both represent the vessel operator. (Id. at 32.) The point is that GPA looks to the agent or person who orders a service or follows billing instructions furnished by the lines or agents, that this is apparently no secret in Savannah, and that if one agent does not wish to be held responsible for a service ordered by another agent, the first agent should so advise its principal and the other agent so that they would not instruct GPA to bill the first agent.

However, if the first agent agrees to be billed for a particular service ordered by another agent, for competitive or business reasons, that is not GPA's fault.

Complainant nevertheless contends that GPA could attempt to hold a husbandry agent who orders berthing or other vessel services responsible for payment of charges for terminal services rendered to containers under leasing arrangements. However, complainant concedes that GPA is not sending bills to such agents for such charges, and there is nothing in the record to suggest why a husbandry agent ordering berthing or other vessel services would order unrelated services to be performed on containers or that husbandry agents would be billed for container-related or other terminal services without their consent. Consequently, there is no compelling reason to believe that the fears of husbandry agents will come to pass.[31] Should GPA change its practice and in fact begin holding husbandry agents ordering berthing and other husbandry service responsible for terminal services rendered to containers although the husbandry agent never ordered the services, and without the agent's agreement, such a practice would appear to be of doubtful propriety and could be found to

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[31] Complainant has cited testimony of Mr. Rollison, GPA's Director of Operations, to support its arguments that GPA unreasonably bills a husbandry agent which orders berthing instead of the line's in-house agent when the line has a leasing agreement with GPA, or bills a vessel agent for terminal charges even though the agent was not responsible for such charges under the line's leasing agreement with GPA, or even though the line's office ordered the services. (Complainant's Opening Brief at 43-44, and record references cited therein.) Mr. Rollison, however, never testified that a local vessel agent like Palmetto would be billed against Palmetto's will when another agent ordered the service. Instead, Mr. Rollison testified that GPA would bill whoever ordered the service unless a line's local office instructed GPA to bill an agent like Palmetto. In such a case, GPA does not question the decision between the line's local office and Palmetto as to which agent should pay the bill, and Mr. Rollison specifically testified that Palmetto has agreed in the past to be billed under such circumstances. (Tr. 834-840.)

be unreasonable as would be the practice of holding vessel interests responsible for charges properly assessable on cargo interests having no connection with the vessel's legal obligations. However, this case involves allegations of actual unreasonable practices, not declaratory orders based on hypothetical possibilities, and also involves requests for specific orders correcting such practices.

Complainant also contends that GPA is violating section 16 First of the 1916 Act because it allows some vessel operators to function without local independent agents but causes other vessel operators to employ local independent agents to arrange for berthing. Thus, vessel operators having leasing agreements with GPA, it is alleged, can arrange for berthing and their agents will not be liable for "vessel charges." (Complainant's Opening Brief at 98.) However, it is alleged, vessel operators without a negotiated lease agreement have to employ a local agent to order berthing services but such agent will be responsible to pay GPA although the agent may not ordinarily have any connection with the berthing. (Id.)

These contentions are not entirely clear. Section 16 First prohibits the granting of any "undue or unreasonable preference or advantage to any particular person . . ." or subjecting "any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 46 U.S.C. app. sec. 816. Is complainant contending that the vessel operators with the leasing agreement are receiving undue or unreasonable preferences or advantages compared to the vessel operators who have not negotiated leases with GPA because the lessee vessel operators' local in-house agents do not have to pay for berthing or "vessel charges" whereas agents of non-lessee operators do have to pay? Or is complainant alleging that the local agents employed by non-lessee vessel operators are unduly or unreasonably disadvantaged compared to in-house agents of lessee vessel operators because the former type agent is responsible to pay for berthing services which the agent orders? Whatever the complainant is contending, I find no support in the record or in law for the allegations.

Findings that anyone has violated section 16 First require specific evidence and a showing that the practice, while possibly non-uniform among affected persons, is "undue or unreasonable." See Perry's Crane Service, Inc. v. Port of Houston Authority, 19 F.M.C. 548, 551-552 (1977); A.P. St. Philip, Inc. v. The Atlantic Land Improvement Company, et al., 13 F.M.C. 166, 174 (1969). However, as GPA states in reply to these arguments, there is nothing wrong with vessel operators entering into leasing arrangements, opening their own offices in Savannah, and acting as their own agents. (GPA's Reply Brief at 32.) As GPA further states, the main point is that GPA is looking to a well-accepted local party for GPA to deal with, and the establishment of a local office by a vessel operator assists GPA in this regard. (Id.) No one is arguing that vessel operators having leasing agreements with GPA enjoy free services whereas non-lessee vessel operators must pay, and no vessel operators intervened in this case to be heard or filed their own complaints. Furthermore, the leasing agreements between ocean carriers and GPA which, by their very nature, give the lessees special treatment, have been filed with the Commission under section 15 of the 1916 Act or sections 4(b) and 5 of the 1984 Act, and were either approved or not investigated or complained about. (Ex. 10.) If there is something in the lease agreement which gives special treatment to lessee ocean carriers which is not give to non-lessee vessel operators, that fact alone is not enough to sustain a charge that section 16 First has been violated. See Stevens Shipping and Terminal Company v. South Carolina State Ports Authority, 23 SRR 267, 301-302 (I.D., adopted by the Commission, 23 SRR 684 (1985).

I therefore find nothing "undue" or "unreasonable" about GPA's practice in dealing with a carrier which has established a physical presence in Savannah under a lease agreement while refusing to rely upon the credit of vessel operators having no similar physical presence in Savannah, and turning instead to the local agents employed by these non-lessee operators for payment, a practice specifically approved by the Commission in the WGMA cases. Similarly, I find no merit to the alternative contention that the local agent arranging berthing or other services for a non-lessee vessel operator is being subjected to an "undue" or "unreasonable prejudice or disadvantage," in violation of section 16 First of the 1916 Act.[32]

Finally, complainant argues that GPA sends bills to vessel agents without segregating the bills by vessel principal and this practice causes the agents to lose their rights to maritime liens. Complainant argues that GPA formerly billed the agents in the manner requested, that GPA should be ordered to return to that practice, and that the reason for

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[32] GPA apparently interprets complainant's arguments to include the allegation that GPA has unduly or unreasonably preferred local forwarders and brokers by not holding them responsible for cargo charges whereas the local vessel agents are held responsible for vessel charges or charges for services the agents have ordered. (GPA's Reply Brief at 32.) As GPA points out, however, local forwarders and brokers are held responsible for cargo charges, and GPA has sued them in the past for collection. (Tr. 758-759; Ex. 12; tariff Item 140.) See also Georgia Ports Authority v. James, 1980 A.M.C. 590, cited in my rulings, 23 SRR at 764-765.

the required practice is the same as that which supported the Commission's decision in WGMA v. The City of Galveston, cited above, 22 F.M.C. at 107, in which the Commission ordered the port to cease applying agents' payments to the oldest invoices without regard to the vessel principal. (Complainant's Opening Brief at 96-97.)

The evidence in support of these contentions consists of the testimony of Mr. Benton of SEMCO, a leading agent-stevedore (Tr. 374-375), Mr. Lear, President of Harrington (Tr. 487), and Mr. Bradley, an attorney expert in maritime law (Tr. 171-172). Mr. Benton testified that GPA sends SEMCO invoices which show the vessels on them, and SEMCO can determine the particular line involved. However, GPA's monthly statements do not identify the line, and Mr. Benton testified that SEMCO therefore had difficulty in determining whether the bills were to be paid by SEMCO or by the principal.[33] Mr. Lear testified that GPA's monthly statement sent to Harrington did not identify the principal but that GPA's invoices did identify the steamship or line. He also testified that he didn't even believe that the invoices enabled Harrington to determine who had been responsible for the service performed and that he believed that at one time they did, "but I'm not certain that they do now." (Tr. 487.) Mr. Bradley testified to a number of problems which an agent faces in trying to collect from defaulting principals, some of which were also faced by GPA but others of which were problems of the

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[33] However, on cross-examination, Mr. Benton testified that one of his problems was that his company did not retain a copy of GPA's invoices which do show vessels. Instead, his "operations people approve the invoices, send it to the owner." (Tr. 413.) He conceded also that his company could make and retain copies "and do double work" but also testified that Charleston, unlike GPA, does provide information as to the line involved on the monthly statements. (Id.)

agents. Among them was the difficulty of enforcing a maritime lien. To enforce such a lien for services provided to a vessel which has been arrested, the arresting party, whether agent or terminal operator, has to trace the goods and services provided to a particular vessel. If the agent pays for the goods or services provided to the vessel by a terminal operator, the agent will be subrogated to the lien rights of the terminal operator against the vessel. However, if the invoice for the goods or services does not name the particular vessel, the agent will have a problem because he still has to prove that they are provided to the particular arrested vessel. (Tr. 171-172.)

The above evidence does not support complainant's argument that the agents lose their maritime liens because of GPA's present billing practices. The record shows that GPA sends invoices for its services, which invoices do identify the vessel, and, as GPA states, GPA also sends out backup material with the invoices so that the agent can see which vessel is involved either on the invoice or on the backup material. (GPA's Reply Brief at 31; Tr. 873-874.) GPA's monthly statements do not break down accounts by vessel principals. (Tr. 773.) However, according to Mr. Bradley's testimony, if the agents can identify the particular vessel from GPA's invoices and backup documents, they should not have to lose their subrogated rights to GPA's maritime lien.

Mr. Lear of Harrington, which has withdrawn its complaint, wasn't sure if the invoices enabled Harrington to determine who was responsible for payment of the services, not mentioning the backup materials which GPA sends to the agents. The Commission ordered the port of Galveston in the case cited to amend its tariff rule allowing the port to apply agents' payments to old invoices even if the payment had been remitted to the port for the account of a different vessel principal. The provision was unreasonable on its face because a diligent principal could advance funds to its agent but the port could apply the funds to a delinquent principal's account so that the agent would have to bill the diligent principal again. As mentioned earlier, GPA has a similar tariff provision in Item 150 which it must delete, as it states it is doing. However, the fact that GPA sends monthly statements with invoice numbers on them from which the agents can determine the vessel or principal is not a practice which is prima facie unreasonable and unlawful. As GPA states, all the agent need do is correlate the invoice numbers on the monthly statement with invoices already received by the agent to determine the appropriate line. (GPA's Reply Brief at 31.) The fact that GPA's failure to break down the monthly statements by names of principals may be less convenient to the agents but, considering the fact that the principals are the agents' own employers, it is difficult to conclude that GPA is acting unreasonably and unlawfully in this regard. It is possible that there is a problem which agents are facing in keeping track of their accounts in some fashion, but the evidence presented by Mr. Benton and by Mr. Lear of Harrington, which has withdrawn its complaint, does not make clear why GPA is violating law by not providing the same information regarding names of vessels, which it provides in the invoices and backup materials, on the monthly statements as well. Because it was complainant's burden of proving that GPA is acting unreasonably and unlawfully in this regard and because the proof is thin and unclear, I cannot find a sufficient evidentiary basis to find a violation of law and to warrant issuance of a corrective order.[34]

ASBA's Contentions

This case interests vessel agents besides the complainant, and ASBA, the association of agents, has contributed its own arguments and briefs, which arguments were mentioned briefly earlier in this decision. The nature of the case has changed somewhat since ASBA's brief was filed, with the elimination of issues of past misconduct and now emphasizes the present and future, and ASBA's participation was confined to argument on legal principles to be applied to the facts developed at the hearing. Several of ASBA's arguments duplicate those of complainant, and others depend upon the facts. As for these arguments, I have found them to lack merit or factual support.[35] However, other arguments emphasized by ASBA deserve attention.

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[34] This type of complaint, i.e., that GPA doesn't break down its monthly statements so as to show the names of the agents' own customers for the agents' convenience seems to be an issue that ought not to have become the subject of formal litigation. As with other minor grievances, it seems that the agents and GPA ought to make an effort to speak with each other and seek an amicable resolution which would help promote the businesses of all of them. Although GPA's conduct does not, in my opinion rise to the level of a violation of federal law in this regard, that does not mean that GPA should not attempt to consider whether it can change any particular practice to help the agents who do business with GPA without harming GPA's own interests.

[35] These arguments concern the fear that the Commission considers a "use equals consent" provision in a tariff to determine the issue whether users have in fact voluntarily agreed to reasonable terms and conditions, the argument that the agents are doing business in Savannah under duress and coercion caused by a monopolistic GPA, the argument that GPA imposes cargo charges on vessel agents, that GPA relieves forwarders or other interests of payment of cargo or other charges, that GPA unlawfully imposes liability upon agents but not upon vessels, and that GPA cannot lawfully continue to place liability on vessel agents in the future because the agents do not consent to being held responsible and cannot be found to consent because of their past course of conduct.

ASBA's continued belief that the classic Volkswagenwerk test should apply to indirect, vicarious users like vessel agents has been rejected by the Commission, which has affirmed my analysis in this regard. Nevertheless, ASBA continues to argue, in effect, that an indirect user like a vessel agent should be compared to a direct, physical user like a carrier and that the small agency fees received by an agent compared to the large port terminal charges paid by the agent should be compared to the much larger freight revenue received by carriers compared to those charges. However, this argument misses the point of the classic Volkswagenwerk test, which is to prevent one direct user of a service from paying a much higher amount for receiving the service than another direct user of the same service. The Volkswagenwerk test has never been applied in the context of a vicarious user or arranger who is not comparable to the direct physical users either in benefits or in revenues. As I mentioned earlier, a better anaylsis, which the agents could propose, is to compare the total benefits received by the agent, not with the total amount of terminal charges paid but with the risk that an agent's principal may not reimburse the agent for the agent's initial outlay of funds for those charges. One might argue that if a person receives a relatively minuscule consideration for an enormously valuable promise that perhaps there was something unconscionable about the contract or bargain and that there was fraud or that no sane person would have entered into such a bargain. There is some authority in contract law on these matters. See rulings, 23 SRR at 776, 777 n. 16. However, the record shows that agents at Savannah are not usually merely agents but are often stevedores as well, that they receive sizeable revenue from the combined agency-stevedoring function compared to the occasional default of a vessel principal, which is a risk of their doing both the agency and stevedoring business, and that they voluntarily undertake agency functions in order to acquire the lucrative stevedoring business. As discussed earlier, rather than showing that the agents-stevedores were forced into lopsided, unconscionable contracts by a monopolistic GPA, the record rather shows that the agents-stevedores chose to assume the risk of defaulting principals by agreeing to perform agency functions, believing that it was still economically worth their while to accept the agency function at some risk and responsibility to advance payments to GPA on behalf of their principals rather than allow a competing agent, who was willing to act as agent to pay GPA, get both the stevedoring and agency business. If any agent believes, furthermore, that the credit rating of a vessel principal is simply too doubtful to warrant becoming that principal's agent or stevedore, GPA's tariff certainly does not prevent the agent-stevedore from refusing to handle that principal's account or from insisting on security from that principal.

ASBA's arguments that there are factual distinctions between the WGMA cases and the instant case and that the WGMA doctrine should be re-examined have, to a large extent, been answered earlier in this decision. As noted earlier, although there are factual differences, there are also similarities between the cases, and moreover, facts peculiar to Savannah like the fact that the agents face competitive problems from other agents who are willing to assume the risk of agency, which problems are not GPA's fault. However, ASBA maintains that in the WGMA cases, the agents were acting for undisclosed principals, that they were compensated for their role as collectors, and guarantors, and that the Commission should consider who should bear the risk of loss when a vessel principal defaults as between agents and the port. These arguments are also not persuasive.

Notwithstanding ASBA's arguments, the basis for the Commission's holdings in the WGMA cases was not that the agents' principals were disclosed, partially disclosed, or undisclosed. It was that the agents had, by a course of conduct and business practice over a period of time, entered into their own arrangements, contracts, or understandings with the ports by which the agents had pledged their own credit and acted as principals themselves toward the ports. See rulings, 23 SRR at 784. Even in agency law, if an agent acts in this manner, the agent becomes personally liable. See rulings, 23 SRR at 773-774. However, as the Commission has stated (23 SRR at 1285-1286), one should not be bound exclusively by agency and contract law but should consider shipping act factors and the role of the agents as intermediaries between ports and vessels, which I have considered and discussed earlier.[36]

As to the fact that agents in certain Gulf ports received commissions of four or three-percent to act as collectors and the argument that the agents at Savannah ought similarly to receive commissions if

[36] ASBA argues that my rulings, as affirmed by the Commission, embracing agency and contract law principles, were "significant rulings favorable to the agents' position" and urges that the agents not lose these favorable principles. (ASBA's Brief at 6.) As shown by my earlier discussion, I have considered whether such contract principles of duress, coercion, and unconscionability and such agency principles as whether an agent has itself become a principal by its conduct toward a third person but have found no record support for the agents' positions. In addition, I have also considered the issues in the shipping act context in terms of the agents' functions as intermediaries and the ports' needs and efficiencies. It is not the failure to consider all of these principles that has led to my conclusion that the agents' contentions, for the most part, do not show violations of shipping law. It is rather that the facts of record do not support the agents' contentions that GPA's practices are unreasonable and are the primary cause of the agents' problems.

they are to bear the risk of defaulting vessel principals, as I have found earlier, those commissions were paid to the agents in the Gulf ports not because of the risk of defaulting vessel principals but as the Commission specifically found, because of new administrative costs incurred by the agents who were to begin collecting charges from cargo interests, and indeed, in some instances, as the Commission noted, the agents suffered losses when some cargo interests did not pay. Furthermore, in other cases, when the Commission has approved the practice of changing transferring billing of wharfage charges from cargo to vessel interests, there was no mention of a requirement that the vessel interests must be paid commissions by the ports on account of their new collection responsibilities.[37]

ASBA also argues that, as to the past, the Commission should consider who should bear the risk of loss when the agent's principal goes into bankruptcy or the agent cannot collect the debt from the principal despite good-faith collection efforts. (ASBA's Brief at 13.) Of course, this argument was made before the State Court ordered Harrington and Palmetto to pay GPA certain amounts for GPA's claims against the two companies and before Harrington and Palmetto withdrew or amended their complaints. Nevertheless, there probably is always going to be a risk that some vessels may go bankrupt or default in their obligations,

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[37] Another distinguishing fact relating to the Gulf ports is that it appears that the agents at those ports were collecting not only vessel-related charges but cargo-related charges as well, unlike the situation in Savannah in which GPA states that it does not bill vessel agents for cargo-related charges. See the Reply Brief by the Nine Intervening Ports, November 22, 1985, at 8-14, for a description of the various tariff provisions at Gulf ports covering a wide variety of charges, especially the Corpus Christi Tariff, quoted at page 11-12, and also in WGMA II, 22 F.M.C. at 460.

leaving agents and stevedores holding the bag and forcing them to seek reimbursement from vessel operators by arresting vessels or otherwise participating in legal proceedings, as Palmetto and others have had to do. This situation is the central problem facing the agents because of which the agents are asking the Commission to order GPA to help them force vessel principals to post security by having GPA refuse to allow an agent to extend credit to a shaky vessel operator or by having GPA obtain security in some fashion from the vessel operator. This problem is serious, and I do not mean in this decision to belittle the agents' concerns over the increasing risk of defaulting vessel principals. However, as I have made clear, I cannot conclude that unless GPA changes its practices in the manner requested by the agents, GPA is violating law and that GPA must be ordered to help the agents be relieved of a problem which is primarily caused by the agents themselves and is, after all, primarily the problem of the agents, not of GPA.

In this regard, it is enlightening to consider the testimony of several agents, especially Mr. Benton, Vice-President of Finance of SEMCO, a leading agent-stevedore, and of Mr. Lear, Harrington's President. Mr. Benton testified forcefully that it is unfair for the agents to be "caught in the middle." (Tr. 385.) Because more and more principals do not allow the agents to pay GPA but are arranging with GPA to pay GPA directly, the agents have no control over the principals in this regard, and if the principal fails to pay GPA, GPA comes after the agent. (Tr. 384-385; 394.) Moreover, more and more vessel principals do not allow the agents to use collected freight moneys to pay GPA, as both Mr. Benton and Mr. Lear testified. (Tr. 386; 468.)

In international trade, when an American seller arranges to sell something to a foreign buyer whose credit is unknown to the American seller, it is customary for the American seller to demand that the foreign buyer open a letter of credit and that such letter be transmitted with requisite funds to an American bank. In such way the American seller has security that he will be paid. The American agents are in a somewhat similar situation, selling services (both agency and stevedoring) to foreign vessel operators without security. Therefore, as Mr. Benton recognized, "with the recent economy of the shipping business . . . eventually it's going to have to evolve to some way to have some protection from the principal. We need to know some guarantee, whether it be letter of credit or something like that. But right now we have nothing except [a financial reporting company of limited utility]. . . ." (Tr. 389.)

Therefore, one possible solution for the agents' problem would be a letter of credit. Another one would possibly be an agreement that the agent be allowed to use collected freight moneys to pay GPA's bills and remit the balance to the vessel principal. Although both Mr. Benton and Mr. Lear testified that the practice in allowing agents to use freight moneys had changed, Mr. Benton also testified that "[s]ome principals still allow us to collect freights," although the majority do not. (Tr. 386.)

Whatever the merits of such ideas, obviously the agents have been unable to implement them, and it is again reasonable to infer that the reason is that if any agent tries to demand security by means of a letter of credit or permission to use collected freight moneys to pay GPA's bills, the vessel operator would almost certainly go to another agent who was willing to do business with the principal without making such demands. See the enlightening testimony of Mr. Benton as to what happens if an agent tries to get a principal to advance cash to the agent. ("I lost the customer . . . I didn't try it more than once." Tr. 379; "[H]e (i.e., the vessel principal) says well if you don't want to (i.e., use the agent's own money without a cash advance), I'll call this guy. You know, there's a lot of competition in the port today." Tr. 387; "But I could not demand cash up front because of competition and--you just don't do that" Tr. 394.)

The above discussion shows that the agents' problem is serious. However, it also shows that competition among agents is the direct cause of the problem and that GPA's tariff does not prevent the agents from obtaining security from their principals. As GPA asks, in effect, why should GPA stick its neck out by making demands for security on vessel operators when ports competing with GPA do not make such demands, when an agent always seems to appear who is willing to represent a principal and pay GPA's bills without demanding security from the principal, when it is each agent's business decision whether to represent a vessel operator without demanding security, and when, in the last analysis, the problem is an internal competitive one among the agents? This does not mean that GPA should not attempt to help agents in their attempts to reduce the risks of defaulting principals after good-faith discussions or that a regional settlement such as that reached in the Anacortes case, cited above, should not be attempted. However, if such a settlement is not possible, whether or not GPA or other ports can help the agents, it appears that the agents must simply address the fact that it is the members of their own industry who are making it difficult for the agents to obtain reasonable security from vessel principals.

As a final matter, ASBA asks that ambiguities in GPA's tariff, which were discussed in my rulings, should be clarified "upon the facts of record." (ASBA's Brief at 15.) ASBA refers to the brief filed by the original complainants on November 1, 1985, prior to the issuance of my rulings. (Ibid at 16.) Whatever the merit of this request, complainant has furnished little or no evidence on the matter and made no specific requests. Without record support and specific requests, I am unable to find violations of law and unable to frame specific corrective orders.

In their earlier brief filed on November 1, 1985, the original complainants argued that GPA's tariff Item 140 was unreasonable and unlawful on its face because of "lack of clarity and arbitrariness." (Complainants' Brief, November 1, 1985, at 59.) Complainants had claimed that Item 140 does not specify that there were at least five types of agents, that Item 140 does not specify what it means by "local agent" nor by "terminal charges," and that Item 140 is not clear as to what type of charges the agents might be liable for secondarily, and not clear as to what is meant by "dockage and related charges, including wharfage," for which the item makes "the local agent" responsible. Complainants had argued that these unclear provisions in Item 140 emphasized "the arbitrary character of respondent's collection scheme reflected in the tariff as to cargo charges, to hold liable everyone it thinks it might get its hands on," regardless of who benefited from the charges and respondent's practice in holding vessel agents liable for vessel charges regardless of that agent's relationship to the transportation transaction concerned. (Id. at 58-59.)

GPA had replied to these contentions in a cross-motion for summary judgement filed on November 21, 1985, arguing that its tariff should be read as a whole and, if so, it showed that Item 140 sets out precisely what the various parties should pay for services provided to the parties and shows that "agents are invoiced for vessel charges and freight forwarder and customhouse brokers are invoiced for cargo charges." (GPA's Cross-Motion at 3-4.) GPA also argued that the vessel and/or owner receiving the services is liable and that Item 140 "simply makes the agent a co-obligor with the vessel or line it represents for services to that vessel or line." (Id. at 4.)

In my earlier rulings, I commented on these contentions as to the ambiguities in Item 140 but found that the remedy was to clarify the tariff to conform to reasonable practices when the facts had been developed showing what the practices were, a remedy followed by the Commission in previous cases involving tariff ambiguities. (See rulings cited, 23 SRR at 780-781.)

At the hearing, very little attention or evidence was furnished as to the earlier arguments that Item 140 was ambiguous and unlawful on its face. The hearing concentrated rather on the actual practices relating to the major issues of vessel-agent liability in general, assessment of all container-related charges on vessel interest, and billing vessel agents for cargo-related charges when cargo interests were not on GPA's credit lists and had not paid the charges. In its post-hearing brief, complainant has made requests for specific corrective orders and when the evidence was cited and previous Commission decisions showed that the tariff required amendment as in the case of the cargo-related charges being billed to vessel agents or Item 150 regarding application of agents' payment to invoices regardless of the principals involved, I found that specific corrective orders were necessary. (See Complainant's Brief at 95-96, and relevant discussion earlier in this decision.) However, because of the lack of attention to the various other arguments regarding ambiguities in Item 140 and the failure to suggest specific corrective language, I am unable to frame a specific order.

Item 140 was originally drafted with breakbulk cargo in mind in 1963. (Ex. 8.) GPA later engrafted additional provisions onto it to deal with the changing circumstances of containerization. The item and Item 150 must be clarified to conform to GPA's actual practices, as discussed earlier. The Commission has required terminal operators to conform to their tariffs to actual reasonable practices, as I have mentioned earlier, and to amend rules like Item 150. See WGMA I, 21 F.M.C. at 251, 263, 269; rulings, cited above, 23 SRR at 781; WGMA/Galveston, 22 F.M.C. at 107. Therefore, when GPA modernizes Item 140 to conform to actual practices, it should clarify what charges are assessable against vessel interests and what charges against cargo interests in accordance with its stated position on the record so that if it does not bill vessel agents for cargo-related charges, as Mr. Rollison says it does not do, the tariff should reflect this fact and clarify what types of charges are meant. See WGMA I, 21 F.M.C. at 269 (". . . [T]he language of Item No. 3 can be improved to reflect its intended result . . ."); 21 F.M.C. at 263 (". . . [I]t is imperative for . . . any other terminal facility . . . to have its tariff distinguish, by tariff rule or regulation, with clarity, whether it is the cargo or vessel interest which is liable for wharfage.")[38]

ULTIMATE CONCLUSIONS

The record shows that agents doing business at GPA's facilities have done so for years with knowledge of GPA's tariff provisions placing responsibility on them for payment of charges for services rendered to the agents' vessel principals and that they have done so in return for considerable benefits derived not merely from agency fees but from far more lucrative stevedoring revenue. Although there was always some risk that a vessel principal might go bankrupt or default and not reimburse the agents for sums the agents advanced to GPA, the agents, who were usually stevedores as well, apparently considered the risk worthwhile in order to acquire the stevedoring business. In recent years, however, vessel principals have been defaulting and some agents-stevedores have been caught hold the bag. The agents would like GPA to share this risk

[38] There should be no difficulty for GPA to revise its tariff to conform to its stated practices. As found previously, GPA has itself set forth on the record which party it bills for its non-container charges. (See finding of fact, paragraph 59, above.) Container-related charges, such as those involved in the state court suits, which are billed to vessel agents, have been identified and described. See, e.g., findings of fact, paragraphs 49, 52. As in previous cases, GPA should be allowed to fashion language and file it in its tariff in conformance with this decision subject to possible improvement by the Commission's staff, if necessary. See, e.g., Perry's Crane Service, Inc. v. Port of Houston Authority, cited above, 16 SRR at 1486-1487, and cases cited therein. Cf. also WGMA I, where the Commission ordered the port to define a service in its tariff, finding the port "remiss" in not previously defining "Terminal Charge" in its tariff. 21 F.M.C. at 251, 269. Although not pressed by complainant in its post-hearing brief, complainant's earlier argument that Item 140 used terms like "all terminal charges" and "all dockage and related charges, including wharfage" in a confusing fashion has some merit. Clarification of Item 140 should eliminate the confusion, be helpful to vessel agents and cargo interests, and show GPA's actual practice more precisely.

or help the agents eliminate the risk by having GPA refuse to allow a willing agent to represent a shaky principal unless the principal posts security with the agent or does something similar. However, the agents' main problem is not GPA's tariff but the fact that there is competition among agents themselves, and a vessel operator can find an agent willing to represent the vessel and assume the risk of the principal's default. Therefore, although the agents face the problem of trying to protect themselves against the risks of defaulting principals, they have apparently been unable to implement such ideas as obtaining letters of credit from foreign principals or using freight moneys they collect to pay GPA's bills before remitting the balance to the principals. Perhaps the agents can eventually utilize such devices or perhaps they can obtain some other type of insurance on an individual or industry-wide basis or can arrange for a regional accommodation similar to that reached in the Anacortes case. It would be helpful for GPA and its competing ports to cooperate with the agents in these objectives. However, the law does not require GPA to risk losing business to other ports by unilaterally attempting to protect the agents from themselves.

The practice of ports' holding local vessel agents responsible for payment of charges is widespread and has been approved by the Commission in previous cases. There is insufficient basis to depart from that precedent in this case. Furthermore, GPA's practice of billing vessel agents for container-related services has a basis in fact and law relating to the carriers' legal obligations, actual control over containers, and course of conduct. However, in certain respects GPA has not been doing what it claims to be its practice, such as when it sends bills to vessel agents for cargo-related charges unpaid by cargo interests. GPA's tariff should be clarified to conform to its stated practice in this regard, which is not to bill vessel agents for such charges, and its tariff must be amended to eliminate a provision allowing GPA to apply agents' payments to invoices without regard to vessel principals.

There is no evidence that GPA's practices are otherwise unlawful with respect to its treatment of different types of agents or vessel operators or other interests or to its practice of sending monthly statements without identifying vessels on the statements.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D. C.
April 7, 1987

(S E R V E D)
(January 29, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-20

PALMETTO SHIPPING & STEVEDORING COMPANY, INC.

v.

GEORGIA PORTS AUTHORITY

ORDER ADOPTING INITIAL DECISION

This proceeding is before the Commission on Exceptions to the Initial Decision ("I.D.") of Administrative Law Judge Norman D. Kline ("Presiding Officer") disposing of a complaint filed by Harrington & Company, Inc. ("Harrington") and Palmetto Shipping & Stevedoring Company, Inc. ("Palmetto") against the Georgia Ports Authority ("GPA" or "Port"). The complaint alleged that GPA's tariff provisions, holding vessel agents liable for terminal charges as principals or guarantors of payment, subject the agents to undue or unreasonable prejudice or disadvantage, and are an unjust and unreasonable practice, in violation of sections 16 First and 17 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. §§ 815 and 816, and sections 10(b)(11) and 10(b)(12) of the Shipping Act of 1984 ("1984 Act") 46 U.S.C. app. §§ 1709(b)(11) and 1709(b)(12). The complaint also alleged other unreasonable practices by GPA relating to the vessel agent liability tariff provisions. Finally, the complaint requested reparations with interest, costs and attorney's fees, and a cease and desist order against GPA's attempts to collect charges from vessel agents.

The Commission's Bureau of Hearing Counsel ("Hearing Counsel"), the Association of Ship Brokers and Agents (U.S.A.), Inc. ("ASBA"), and a group of ten Gulf Coast and South Atlantic Coast public port authorities ("Ten Ports") intervened in the proceeding.[1] Intervenors' participation was limited to the filing of amicus briefs.

At the pre-hearing conference convened in connection with the proceeding, the Presiding Officer approved the parties' request that certain legal issues be resolved prior to the taking of evidence upon cross-motions for summary judgement. The issues were briefed by the parties and the Presiding Officer issued Rulings On Motions for Summary Judgement and Related Rulings on Governing Principles of Law ("Rulings"). Appeals of the Rulings to the Commission were filed. The Commission granted the appeals, heard oral argument and issued an Order Affirming Administrative Law Judge's Rulings on Motions for Summary Judgment and Related

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[1] During the course of the proceeding the number of public port authorities actively participating as intervenors fluctuated. At this stage, the following public port authorities are represented: Port of Houston Authority of Harris County, Texas; South Carolina State Ports Authority; Tampa Port Authority; Board of Trustees of the Galveston Wharves; Port of Corpus Christi Authority of Nueces County, Texas; Greater Baton Rouge Port Commission; Alabama State Docks Department; Brownsville Navigation District of Cameron County, Texas; and, Lake Charles Harbor and Terminal District.

Rulings on Governing Principles of Law ("Order Affirming Rulings").

Following the issuance of the Order Affirming Rulings, hearings were held in Savannah, Georgia and further briefs were filed by the parties.[2] The Presiding Officer subsequently issued a 137-page I.D. finding that GPA's practices were not proven to be unreasonable or unlawful under the Shipping Acts. Palmetto and ASBA filed Exceptions to the I.D. GPA, the Ten Ports, and Hearing Counsel filed Replies to Exceptions.

FACTS

The operative facts of this case have been extensively discussed in the I.D. and are amply supported by substantial evidence of record. The parties have not raised any valid objections to this portion of the I.D. and, accordingly, the Commission adopts those factual findings. Without repeating the detailed findings of the I.D., the critical facts found dispositive of the issues in this case by the Presiding Officer are summarized below.

Palmetto is a regional steamship agency and stevedoring company operating in several South Atlantic ports and

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[2] GPA had previously filed suit against both Harrington and Palmetto in two state court actions and on January 13, 1987, recovered 50 percent of the outstanding billed charges claimed in each case. Following the hearings in this proceeding but before the I.D. was issued, Harrington withdrew its complaint in this case. The Presiding Officer amended the title of this case accordingly. Also, Palmetto withdrew its claim for reparations but still seeks "declaratory relief."

represents three major vessel principals in Savannah. The firm's agency revenues of approximately $12,000 per month represent 6.18 percent of its total monthly revenues, with most of the firm's income generated by its stevedoring operations.

Palmetto performs two types of agency services, operational and husbandry. Operational services involve handling the business and financial aspects of a principal's vessel call, and husbandry services see to the logistical needs of the vessel. Husbandry services are performed on a flat fee basis of $800 to $1,200 per call. Operational services are performed on a percentage basis of 1 percent to 3 percent of freight charges. Vessel calls incur port charges of up to $20,000, resulting in agency fees of up to $2,000. Arrangements for a vessel call occur about three days in advance, allowing sufficient time to estimate port charges before arrival within a 10 percent accuracy range.

Today most agents perform primarily husbandry services and little operational services. Due to the low level of revenue generated by husbandry services, agents have come to rely on stevedoring services as their primary source of income. Agency work is viewed primarily as a method of obtaining stevedoring accounts. Although vessel agents have traditionally advanced port charges for their principals, direct payment by principals with agents acting only as bill transmitters is a growing practice. Most lines also employ in-house personnel to do agency work.

GPA is a major load center for the South Atlantic port range and has the only facility with shore-based operational container handling equipment in Savannah. GPA has annual revenues of over $53,000,000 and assets of over $350,000,000. Since 1963, the liability provision of GPA's terminal tariff, Item 140, has held persons performing forwarding functions primarily liable and vessel agents only secondarily liable. In 1975, Item 140 was amended to make vessel agents primarily liable for Port charges. However, Item 140 still retains the right to hold vessels and their owners liable for Port charges. This practice is common among South Atlantic and Gulf ports. Since 1971, the South Atlantic Marine Terminal Conference, of which GPA is a member, has agreed to hold vessel agents liable for container charges to prevent double billing of cargo interests and because ports could not always determine the identity of the shipper. In 1975, GPA also began assessing wharfage against vessel interests. Now, only handling and storage charges are billed to cargo interests. However, if cargo interests do not pay, GPA has billed vessel agents on breakbulk cargo.

Agent liability was not a problem until the late 1970's because agents had effectively operated only as billing conduits between vessel principals and GPA. However, in recent years, increased instances of vessel owner defaults have resulted in more collection efforts against agents. GPA's Item 140 has created difficulties for vessel agents because competitive pressure within their industry has effectively prevented them from demanding cash advances from principals. Therefore, a single default can cause serious financial problems for a vessel agent.

GPA has generally not been willing to put shipping lines on a "cash basis" and has relied on the liability of agents. Agents generally do not have the ability to determine the credit worthiness of their principals. GPA has direct dealings with vessel lines, is better able to obtain credit information from them, and can more easily enforce maritime liens against vessels. While cash in advance is the best collection insurance, inter-port competition inhibits GPA from demanding cash advances, just as inter-agent competition prevents agents from seeking cash advances. Moreover, holding vessel agents liable for terminal charges is an easier collection system to administer and facilitates the movement of cargo through terminal facilities.

DISCUSSION

The Exceptions to the I.D. consist essentially of rearguments of contentions already advanced before the Presiding Officer, addressed and disposed of by him (and, in some instances, the Commission itself on earlier motions). The Replies to Exceptions generally agree with the I.D. and argue that the Exceptions should be dismissed and the I.D. affirmed. We concur. The Presiding Officer's findings and conclusions as reflected in the I.D. are proper, wellfounded and fully supprted by the law and the facts of record in this proceeding. Accordingly, those findings and conclusions are adopted by the Commission for reasons set forth in the I.D. and further elaborated on below.

The underlying principles of law applied in this proceeding were developed by the Presiding Officer's Rulings and the Commission's Order Affirming Rulings. As a result of these interlocutory decisions the following matters were established: (1) it is not unreasonable as a matter of law for a terminal operator to hold vessel agents liable for terminal charges incurred on behalf of vessel principals; (2) the reasonableness of GPA's practices relating to vessel agent liability must be adjudicated under the standards enunciated in the WGMA cases[3] in light of the particular facts adduced in the record of this proceeding; (3) and the Volkswagenwerk[4] test of reasonableness does not apply in this case.

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[3] West Gulf Maritime Association v. Port of Houston Authority, 21 F.M.C. 244 (1978), aff'd without opinion sub nom. West Gulf Maritime Ass'n. v. FMC, 610 F.2d 1001 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980) ("WGMA I"); West Gulf Maritime Association v. Port of Houston Authority, et. al., 22 F.M.C. 420 (1980), aff'd without opinion sub nom. West Gulf Maritime Ass'n. v. FMC, 652 F.2d 197 (D.C. Cir.), cert. denied, 456 U.S. 206 (1981) ("WGMA II").

[4] In Volkswagenwerk v. FMC, 390 U.S. 261 (1968), the Supreme Court held that the test of reasonableness for certain terminal charges under section 17 of the 1916 Act is whether the charge levied is reasonably related to the service rendered or to benefits received by the charged party.

ASBA[5] has again argued that GPA's practice of imposing liability for terminal charges on vessel agents is subject to the Volkswagenwerk test of reasonableness. This issue has been exhaustively discussed, analyzed and decided in earlier rulings in this case by both the Presiding Officer and the Commission. These determinations are reaffirmed here. ASBA's contentions to the contrary are but rearguments of matters already addressed and expressly rejected by the Commission.

Likewise without merit is ABSA's contention that ambiguity in the language of GPA's tariff invalidates its practices and authorizes the Commission to require GPA to enter into negotiations with vessel agents to devise a new system of collecting tariff charges. The central issue here is the reasonableness of GPA's vessel agent liability practice. Ambiguity and reasonableness are generally two distinct matters calling for separate analyses and remedies. Ambiguity of tariff language is remedied by clarification of the language. WGMA I, 21 F.M.C. at 263. Standing alone, it does not generally constitute a sufficient basis for ordering a substantive modification of terminal practices.

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[5] Palmetto takes issue with virtually every critical finding of the I.D. However, its Exceptions are pro forma and specifically adopt the arguments of intervenor ASBA. For the sake of brevity only ASBA's Exceptions will be discussed.

Further, ASBA's demands that the Commission order GPA to negotiate with it and Palmetto have no basis in law.[6] If a practice is found unreasonable and unlawful but the Commission does not prescribe a different practice, the terminal operator retains the right to choose for itself an alternative method of operation that complies with the law. Stevens Shipping and Terminal Co. v. South Carolina State Ports Authority, ___ F.M.C. ___, 23 S.R.R. 684, 688 (1985); see also California v. United States, 320 U.S. at 582; Cargill, Inc. v. FMC, 530 F.2d 1062, 1071 (D.C. Cir.), cert. denied, 429 U.S. 868 (1976). Accordingly, although GPA may choose to negotiate its tariff provisions with Palmetto or ASBA, the Commission cannot compel it to do so under the facts of this case.

The critical issue before the Commission relates to the the Presiding Officer's conclusion that, although conditions

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[6] Section 10(d)(3) of the 1984 Act makes the prohibition in section 10(b)(12) of the Act against "an unreasonable refusal to deal" applicable to marine terminal operators. 46 U.S.C. app. § 1709(d)(3). The Commission has not construed this prohibition to require the negotiation of terminal charges and practices. The prohibition also appears elsewhere in the 1984 Act, see section 10(c)(1), id. § 1709(c)(1), and is intended to prevent actions "that restrict a shipper's ability to select carriers in a competing trade . . . ." See H. Rep. No. 53, Part 1, 98th Cong., 1st Sess. 35 (1983). Because there is no allegation that vessel agents are being prevented from choosing among competing terminal facilities, it does not appear that a violation of section 10(b)(12) is at issue here.

at Savannah differ somewhat from those found in WGMA I,[7] those differences are not so significant as to preclude the application of the WGMA I precedent to this case. The alleged factual distinctions between this case and WGMA I, raised by the Exceptions, are: (1) the nature of the liability imposed by GPA; (2) the exercise of "monopoly power" by GPA or, stated another way, the absence of a voluntary course of conduct by vessel agents; (3) the superior collection abilities of GPA; (4) the excessive amount of liability imposed and lack of consideration or "compensation" to vessel agents; and (5) the change in prevailing industry practices since WGMA I. These distinctions from the WGMA cases were discussed by the Presiding Officer and were found not to warrant a departure from that precedent in this case. The Commission agrees with and adopts the Presiding Officer's analysis and findings on this issue. Each of these alleged distinctions is discussed below.

ASBA argues that the GPA tariff makes vessel agents solely responsible for vessel charges as well as imposing surety liability for cargo charges, an allegedly greater degree of liability than that existing in WGMA I. However, while GPA's tariff language is somewhat ambiguous on the exact nature of vessel agents' liability, a defect that the

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[7] Although there are several WGMA decisions dealing with the vessel agent liability issue, see I.D. at 5 n.4, WGMA I established the underlying factual basis for the analysis of the reasonableness of the practice.

I.D. addresses and properly remedies,[8] the evidence of record shows that GPA's actual practice is less severe than the Exceptions allege.

GPA generally treats vessel agents in a similar fashion as that found in WGMA I. That is, when an agent arranges terminal services for a vessel call, GPA charges the account of the vessel agent the vessel charges assessed for the services, periodically bills the agents on an itemized account basis, and requires the agents to bill their principals, collect the amount due and remit payment for each line item account. The I.D. found that GPA does not now bill vessel agents for cargo charges and does not now apply the payments for one vessel line item account to other more delinquent line item accounts. It also found that GPA retains its right to hold vessel principals liable for charges and accepts payment directly from vessel principals on their accounts. Therefore, although GPA generally looks to agents first in collecting accounts payable, its method of operation takes cognizance of the fact that vessel agents

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[8] The I.D. concludes that GPA may bill vessel interests for containerized cargo services because vessel interests have primary control over containers at GPA's facilities and the services are necessary to fulfill the vessel's transportation obligation. However, the Presiding Officer directed that GPA's tariff be amended to conform to its practice of billing breakbulk cargo terminal charges to cargo interests. Similarly, he ruled that GPA may not apply current payments to old invoices but must credit each payment to its respective vessel call invoice.

are billing and collection "conduits."[9]

The Exceptions also rely on the fact that GPA has the only container facilities in Savannah and that the South Atlantic Terminal Conference membership all agree to the practice. This alleged use of its "monopoly power" is said to constitute unlawful business coercion, negating any possibility of a voluntary course of conduct to support a finding of a separate agreement between GPA and vessel agents. In addressing this issue, the Presiding Officer found that vessel agents voluntarily do business with GPA with full knowledge of the Port's liability policy, in order to obtain the considerable economic benefit derived by their use of GPA facilities. Accordingly, he properly concluded that vessel agents have not been subjected to liability as a result of duress, coercion or unconscionable agreements imposed through monopoly power.

While the situation at Savannah with respect to the availability of alternative private terminals may differ somewhat from that in WGMA I, the prevalence of the practice of holding vessel agents liable nevertheless existed in WGMA

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[9] ASBA's allegation of a violation of section 16 of the 1916 Act seems to be based on the premise that vessel agents are held liable for vessel charges while their principals are not and that vessel agents are held liable for cargo charges while cargo interests are not. The I.D. findings that GPA in fact holds vessel principals liable for terminal charges and does not bill vessel agents for cargo charges would appear to satisfy the gravamen of ASBA's section 16 complaint.

I.[10] To the extent that vessel agents are faced with liability at almost any terminal where they choose to do business it can be said that they do not voluntarily accept liability for their vessel principals. However, this does not necessarily amount to coercion or preclude a finding that agents receive sufficient consideration to support a separate contractual assumption of liability.

The I.D. found that agency work generates only a small part of the revenues of firms engaged in this work and is undertaken to increase the volume of stevedoring business, the main source of revenue of these firms. As a result, vessel agents do not appear to be dependent on agency work and voluntarily accept the market conditions of the business to enhance their firms' overall profitability. But while vessel agents would prefer to reduce the risks inherent in their business they cannot, as the Presiding Officer noted, compel ports to assume those risks. Ports are entitled to establish the terms and conditions of use of their facilities with a goal of reducing their business risks. While the ports may enjoy an advantageous bargaining position, their use of that position, under the facts of this case, does not amount to unlawful business coercion.

Another alleged distinction from WGMA I is that the superior administrative and business operations of GPA

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[10] Although there were thirteen private facilities at Houston in addition to the public facilities, only one private terminal did not adopt the vessel agent liability tariff provision. WGMA I, 21 F.M.C. at 250 n.16.

coupled with certain legal advantages in enforcing maritime liens put the Port in a better position than the vessel agents to collect delinquent vessel principal accounts. In the context of post-default collection efforts, this does appear to be a legitimate distinction from WGMA I, as the I.D. found. However, the Commission will not impose additional business risks on GPA for maintaining a well organized and efficent business operation. Vessel agents are not without legal remedies against defaulting principals and, as was pointed out in the I.D., vessel agents' collection abilities are impaired by competitive concerns, not organizational or operational handicaps.

In any event, the more relevant inquiry would appear to be who has the better ability to require advance security from vessel principals. Both the Port and the vessel agents have competitive pressures inhibiting instituting advance security requirements. Assuming cash advances are not feasible, the matter reduces itself to the comparative abilities of GPA and agents at Savannah to selectively choose who to do business with on the basis of credit-worthiness. GPA, a public port authority operating under public tariffs, is restricted in its ability to refuse service on the basis of potential future default by a vessel principal. Vessel agents, not being public utilities and not being solely dependent on agency revenues, would appear to be in a better position to decline to serve questionable clients.

The Exceptions urge the Commission to impose a settlement such as that reached in Alaska Maritime Agencies, Inc. v. Port of Anacortes et al., ___ F.M.C. ___, 22 S.R.R. 1181 (F.M.C. 1984), ("Anacortes")[11] as a solution to the competitive obstacles against an advance security system faced by the Port and the vessel agents in Savannah. Certainly, it is preferable to have all the parties agree upon a system of requiring advance security from vessel principals rather than force one party or the other to either bear the risk of loss or turn away business. However, GPA is the only member of the South Atlantic Terminal Conference whose tariff is subject to the complaint in this case. Ordering GPA alone to require advance security would put it at an unreasonable competitive disadvantage and could cause it to lose a substantial amount of business. Accordingly, while it may be appropriate for the industry to take the initiative to negotiate a mutually acceptable practice, the Commission cannot impose an

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[11] In Anacortes, West Coast ports agreed not to impose liability on vessel agents but to demand cash in advance for terminal services from vessels, except when alternate arrangements are made on a case-by-case basis.

industry-wide Anacortes type agreement in this case.[12]

The vessel agents also argue that the amount of losses they now risk has increased greatly from prior cases. The lack of any "commission" or "discount" on vessel charges collected by agents also appears to be a factual distinction from WGMA I. The Presiding Officer found that agents are in fact obtaining less revenue at Savannah and are exposed to greater financial risks than in previous cases. The question then is whether changing industry conditions imposing possible greater hardship on vessel agents now render a previously reasonable liability provision unreasonable. The I.D. concluded, and we agree for reasons stated therein, that an increased amount of losses by agents does not in and of itself render the liability provision unlawful or force GPA to bear the risk of loss.

This leads to the final distinction from WGMA I alleged by the vessel agents; i.e., that in light of the present harshness of the liability rule more ports are now utilizing alternative methods of fee collection. Again, and as indicated in the I.D. and above, perhaps an Anacortes type

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[12] The Commission might prescribe industry-wide liability practices pursuant to its rulemaking authority in a separate proceeding if such action is deemed necessary to accomplish a Congressional objective underlying the statutes it administers. See Pacific Coast European Conference v. FMC, 376 F.2d 785 (D.C. Cir. 1967). However, in light of the apparent diversity of practices in different port ranges, an industry-wide rule may not be appropriate at this time. Accordingly, until such time as a viable industry-wide solution is developed, liability practices will be adjudicated on a case-by-case basis.

procedure would be a productive way for the affected interests at Savannah and other ports to address the issue of how to reduce the risk of losses from an increasing number of defaulting vessel principals. However, the relevant market in this case is the South Atlantic port range, and it may not be appropriate to compare ports within that range to West Coast ports. In any event, under the facts presented here, the Commission will not impose such accommodations on GPA or abandon the WGMA precedents.

THEREFORE, IT IS ORDERED, that the Exceptions to the Initial Decision filed by Palmetto Shipping & Stevedoring Company, Inc., and the Association of Ship Brokers and Agents (U.S.A.), Inc., are denied, and,

IT IS FURTHER ORDERED, that the Initial Decision of the presiding officer is adopted, and,

FINALLY, IT IS ORDERED, that this proceeding is discontinued.

By the Commission.

Joseph C. Polking

Joseph C. Polking
Secretary